John George Russell and His Impact on New Zealand Tax Jurisprudence: An Investigative Analysis

A thesis submitted in fulfilment of the requirements for the Degree

of

Master of Laws at the

University of Canterbury

by

Alistair Hodson

Student Number: 54363250

Please Note: This thesis has had material redacted for legal reasons. Please contact the author if you have any questions about the content note

Contents

I Abstract

Mr John George Russell holds a special place in New Zealand's relatively brief tax history. He is a person who has challenged Inland Revenue's authority and the taxing statutes more than any other individual. If Mr Russell had followed his father's early advice and studied engineering he may have taken over the family farm on the outskirts of Hamilton and by now have been enjoying a peaceful retirement. Instead, his enjoyment of the accounting subjects taken at college, which he had enrolled into in error, ultimately led him to becoming a leading figure in the development of the then emerging New Zealand money market, and the managing director of the merchant bank Securitibank. Novel approaches to commercial issues and tenacity in litigation are the trademarks of Mr Russell, Auckland tax advisor and business consultant.

Mr Russell is well known in New Zealand tax circles as the creator and defender of the 'Russell tax template', developed in the 1980s as a mechanism to turn the 'water' of taxable receipts into the 'wine' of untaxed gains. Template related issues are still being litigated some three decades later. There have been many cases related to the template covering both substantive and procedural issues. Mr Russell has had limited success on procedural grounds claiming his wins have been the result of good luck more than anything else. He strongly claims Inland Revenue have run a vendetta against him for many years.

Inland Revenue have taken several different 'Tracks' when assessing various parties it considered received the tax advantage from the template. The 'Tracks' used to assess various parties are also regarded by Mr Russell as a vendetta tactic. Ultimately the litigation has led to 'Track E' with Inland Revenue personally assessing Mr Russell for tax, penalties and interest totalling in excess of NZD $200 million. A Court of Appeal decision found for Inland Revenue and confirmed Mr Russell's personal tax assessment. Leave to the Supreme Court was not granted and Mr Russell has recently commented that a 'Track F' may now exist.

Mr Russell has accused the Commissioner of Inland Revenue of fraud in respect of backdated assessments, and Inland Revenue have accused Mr Russell of fraud in relation to backdated documents. Mr Russell commented during one of our interviews when challenged about document backdating that "the only difference between an honest person and a dishonest one is often a date."[1] This thesis attempts to provide the reader with not only an overview of the litigation associated with Mr Russell, but also seeks to provide an insight into the person of Mr Russell. The Russell tax template was held to be a tax avoidance structure by the Privy Council in 2001. I did not intend to debate the merits of the Russell template with Mr Russell.

One of the least known postures of Inland Revenue's Compliance Model is that of the 'game player'. It would appear that Mr Russell has many tendencies attributed to a person classified under this framework to be a classic game player. This thesis attempts to provide an in-depth overview of perhaps Inland Revenue's most litigious taxpayer and asks whether Inland Revenue are now on 'track' to a conclusion. This thesis considers Mr Russell's contribution to tax jurisprudence by looking at his journey over the last 30 years, giving the reader an insight into the life of Mr Russell.

[1] Interview with Mr John Russell, Subject of thesis, (the author, University of Canterbury, 28 July 2011) (filmed live in lecture with students).

II Acknowledgements

I would like to thank first and foremost Mr John Russell for allowing me the opportunity to gain such an insight into his life. John and his wife Melva have been most hospitable allowing me into their home on several occasions to have very lengthy chats in the lounge. I would also like to thank John for travelling to Christchurch to spend two days being interviewed and filmed in a recording studio, as well as being a guest lecturer to students, a highlight for the 2011 academic year.

I would like to thank Professor Valerie Braithwaite from the Australian National University in Canberra for her insights into the Compliance Model used by both the Australian Tax Office and Inland Revenue, and our discussions in late December 2008 as I commenced my research. The visit to Canberra was made possible by the support from the ACIS Head of Department at the time.

I would like to thank my supervisors, Professor Adrian Sawyer and Associate Professor Andrew Maples, who have been most supportive of this research. This has really been a voyage of discovery in more ways than one becoming a much bigger project than first anticipated, mainly due to the richness of conversation with Mr Russell in his home at Kawakawa Bay, and the 'moving feast' that the litigation still is, although now it would appear to be in its closing stages.

This thesis has survived the two major earthquakes experienced in Christchurch, the first on 4 September 2010, remarkably with no loss of life. Sadly, a second earthquake, on the second day of the 2011 teaching year, brought many casualties, mourned not only by the nation of New Zealand but around the world. One of the results of the earthquakes was the deferment of the completion date for the thesis. There has been considerable upheaval of moving offices, having to hastily pack material that was previously systematically laid out for easy reference in my office, as well as upheaval at home with earthquake inspections and so forth. The deferment of the thesis submission allowed for the inclusion of the closing stages of the 'Track E' litigation, which is a timely and relevant place to conclude the 'story'!

I would like to thank friends and family for their words of support and encouragement throughout the development of this Master of Laws thesis. Finally and most importantly, I would like to thank God for his faithfulness that he shows to me on a daily basis.

III List of Figures and Tables

Chapter I
Introduction

I Introduction

There have been many cases relating to the Russell tax template, covering both substantive and procedural issues. Mr Russell has had limited success on procedural matters, claiming his wins have been the result of good luck more than anything else. Mr Russell still battles Inland Revenue after over thirty years, although some of his earlier optimism of substantive litigation success may now be fading. Although there has been limited litigation success for Mr Russell, one fact remains true: he has had an impact on the way Inland Revenue conduct themselves with taxpayers that challenge their authority.

What is unique to the Russell template cases is not only the longevity of the litigation but also the different 'tracks' Inland Revenue have followed to assess income derived from various parties associated with the Russell template. The multitude of 'tracks' to assess the income has no doubt added years to the litigation journey.

Mr Russell officially 'retired' in 1999 but estimates that he still spends many hours every week on template-related issues. The personal strength required to prepare for and engage in 'battle' with Inland Revenue can easily be overlooked; there must be strong reasons to justify actions taken. Not many individuals would have continued such a long and drawn out engagement with a powerful revenue authority. Despite critics of his personal views of what constitutes tax avoidance or acceptable tax planning, Mr Russell has left an indelible mark on the Inland Revenue litigation landscape and it would be doubtful if a single individual in the future would surpass his efforts. In an interview[2] shortly after the *O'Neil* Privy Council decision, Mr Russell admitted enjoying 'the game' of battling the tax authorities, describing it as 'very intellectual.' Certainly, no individual has taken up so much Inland Revenue time as Mr Russell, or been the target of so much tax litigation.

[2] Graeme Hunt, *Hustlers, Rogues and Bubble Boys: A History of White-Collar Mischief in New Zealand*, (Raupo Publishing (NZ) Ltd, Auckland, 2001) at 73; *O'Neil v Commissioner of Inland Revenue* [2001] UKPC 17, [2001] 3 NZLR 316 (PC), (2001) 20 NZTC 17,051.

A The Early Years – "Dare To Be True"

Mr Russell was born on 8 October 1934 and grew up on the outskirts of Hamilton. He was just a usual 'country lad' growing up on a farm in Rototuna.[3] Academically he succeeded well at both primary school and Hamilton Technical College. The motto of Fairfield School where he attended was 'Dare to be True'. Mr Russell stated that he has always remembered that motto and has endeavoured to take it on board personally throughout his life.

Initially when enrolling at college he had intended to study engineering, with a view to take over the family dairy farm, as his father had envisaged.[4] An enrolment error led to him attending introductory accounting classes which he enjoyed immensely. Although perhaps disapproving at first, his father ultimately agreed that he should continue studying the accounting discipline. Mr Russell became both a Chartered Secretary and a qualified accountant.[5] Mr Russell had envisaged at one stage working for a large chartered accounting firm, but found the prospect of working in industry more attractive. He first worked as an accountant for RB Swan & Co,[6] and then for some well-known New Zealand companies at the time, such as L J Fisher & Co. Ltd,[7] Lamson Paragon (NZ) Ltd,[8] and Butland Industries Ltd.[9] These companies were all in quite different industries:

---

3 In the early days John Russell would ride a horse to school. He enjoyed his school days and was involved in both music and drama classes. His love of music was founded from his involvement in the school music classes. John and his wife Melva both have a strong appreciation for the arts and attend plays or other cultural events whenever possible.

4 John Russell's younger brother, Barry, enrolled in engineering at college to his father's delight. The two brothers were very close. John ended up doing the 'books' for the family farm. John was the dux of both Fairfield School and Hamilton Technical College. At school reunions sometimes twenty or thirty years later people would remember Barry, but not him. He recalls Barry's notoriety being attributable to his early exploits of riding around Hamilton at speed on a fast motorcycle. John was known as 'Barry Russell's brother' at such events.

5 John Russell attended night school at Hamilton Technical College and finished his professional qualifying exams. This took about three years in total. He valued the benefit of mixing theory with the practical day to day experience he was gaining. Learning how it should be done with what was really being done in the world was invaluable to him. He was always very interested in cost accounting and became a member of the New Zealand Society of Accountants.

6 RB Swan & Co was a large accounting firm, dealing mainly with farming clients. They had 19 branches with a very large branch in Hamilton where John Russell was employed. They had developed a type of mass production technique (all the cashbooks were pre-printed) in relation to preparing accounts, being able to produce a set of accounts for a farmer at the time for £11. John learned a lot from his time there and was employed for about two years. It was a time of over full employment (1949). John Russell was very competent at his job earning £5 a week at the time, stating it was twice the going rate.

7 John Russell was initially employed as a cost accountant, then accountant, and then took on the role as company secretary. L J Fisher & Co Ltd manufactured decramastic tiles for roofing applications. The decramastic roof tile had its origins from World War 2 when United Kingdom airfields were coated with a tar and camouflaged with different coloured ground up rocks to look like grassy fields. Ben Booth, who developed the process, met with Lou Fisher. Lou Fisher saw a wonderful opportunity for this type of application in the New Zealand building industry. The main products of LJ Fisher & Co Ltd were structural steel and aluminium windows, which were a very recent invention when Mr Russell started working there.

8 Lamson Paragon (NZ) Ltd was a printing company using the latest types of printing techniques. The machines were a pre-runner to the modern computer. Mr Russell was the cost accountant. The business produced various sprocket punch stationery with no competition therefore being in a monopoly situation. During our interview on

building and construction; printing; and food manufacturing. Mr Russell gained a lot of knowledge from his early employment and, on reflection, considered the printing industry to be the most fascinating.[10]

Figure 1: Mr Russell, circa the Securitibank years (1966 to 1976).

The promise of a very large pay rise saw Mr Russell relocate to Auckland and enabled him to marry Melva in 1956; together aged 20 and 21 respectively, they started married life in Onehunga, Auckland. Mr Russell's chosen field of study had led him initially into a successful career of cost accounting; however, he then went on to become a leading figure in the formation of the emerging money market in New Zealand.

B The Rise ... And Fall of Securitibank

> *"...what was happening really is we were stretching the rules...we were within the rules but they were really being stretched...without people doing that you don't get any development..."*[11]

---

his early working life Mr Russell mentioned that he had purchased one of the first calculators available in New Zealand and paid £1,500 pounds for it at the time. It was approximately 300mm by 600 mm in size with neon tubes for the figures. Mr Russell estimated it was about 98 per cent correct!

9 Butland Industries Ltd was privately owned by the Butland family. One of their food lines was 'the Crest' brand. Many of the product lines were later sold to Unilever. The company had 120 salespeople. They produced both canned and packaged food items. Mr Russell was employed at Butland Industries Ltd for about 18 months gaining considerable experience both in the cost accounting and the insurance area. He decided to then look at employment in the building industry.

10 Interview with Mr J G Russell, above n 1.

11 Interview with Mr J G Russell, above n 1.

In 1962 the short term money market was created by the government as an avenue for business firms to get interest on their money overnight.[12] Short Term Deposits Ltd was established by an Auckland share broking firm,[13] with Mr Russell being its first employee.[14] [redacted][15] After receiving only minimal training for two weeks in Australia, Mr Russell began operating out of a small one room office in central Auckland, assisted only by a typewriter. Short Term Deposits Ltd had a license from the Reserve Bank of New Zealand, the same type of license as a commercial bank. Initially people were cautious with regard to Short Term Deposits Ltd, being used to previously dealing only with established banks.

Mr Russell travelled the length of New Zealand promoting the new business, competing with the banks for depositor's funds, and taking on speaking engagements to promote the new business.[16] Short Term Deposits Ltd saw an opportunity of expanding into other instruments like Bills of Exchange. Another company, Secured Deposits Ltd, was set up for this purpose.[17] During this time Mr Russell stated that what they were doing was "stretching the rules and that without doing that, there is really no development."[18]

Securitibank Ltd (Securitibank) was then set up as a holding company. The shares in Short Term Deposits Ltd and Secured Deposits Ltd were transferred to Securitibank. Securitibank then created their own bank,[19] Merbank, to trade their Bills of Exchange. Securitibank expanded very quickly and in 1976 had approximately $100 million dollars in the bank bill market. Mr Russell considers a

---

12 Mr Russell stated that in the 1960s the deposit taking industry was very much controlled by the banks, which were paying very low rates of interest and requiring funds to be deposited for a minimum of a month at a time. The government were one of the main beneficiaries of the short term money market as funds had to be invested in Government stock.

13 [redacted]

14 Mr Russell attributes being employed for this role due to having amassed a wide variety of experience prior in industries that would perhaps be the type of customers Short Term Deposits Ltd would want to attract.

15 [redacted]

16 As a result a very big business was established. There were three other short term money market dealers in competition at the time. None of the other dealers actively promoted their business like Short Term Deposits Ltd did. Mr Russell essentially would talk to 'anyone that would listen'. Ultimately they were probably doing more business than all of the other competitors put together.

17 This business was involved entirely in local body stock, being able to supply another source of funding to local bodies. Secured Deposits Ltd did not have any Reserve Bank backing so it would buy government stock either off Short Term Deposits Ltd or directly off the Reserve Bank. The Reserve Bank was concerned about this practice. Mr Russell stated that they were only looking at purely the legal side of it. Mr Russell stated that 'what we were doing was we were stretching the rules…we were within the rules but really stretching them'. (Interview with Mr John Russell, Subject of thesis, (the author, University of Canterbury, 27 July 2010).

18 Interview with Mr J G Russell, above n 17.

19 At the start of setting up Short Term Deposits Ltd there was a lot of opposition from the banks, as essentially it was competition for them. The banks at the time would not transact with Short Term Deposits Ltd so they created their own bank.

bill market essential for any modern economy and credits what they (Securitibank) did as getting it started in New Zealand. People in the business community could borrow money from Securitibank rather than going to their bank. Securitibank became very exposed in a falling property market and this ultimately led to its collapse in 1976.[20]

SECURITIBANK LIMITED

70717

This is to certify that SECURITIBANK LIMITED was incorporated under the Companies Act 1955 as a Private Company (Shares) on the 3rd day of June 1966 and was removed from the register on the 15th day of February 1995.

The shareholders of Securitibank voluntarily placed the company into liquidation, with liquidators appointed.[21] Ultimately every creditor was paid in full, with a surplus distributed to some of the bill holders by way of a Court order.[22] Mr Russell was 41 years of age at the time of the collapse. Securitibank was located in central Auckland. Mr Russell claimed he worked up to an estimated 100 hours a week, indicative of his personal stamina. Merbank,[23] the company initially named and registered by Mr Russell, was one of the companies in the Securitibank Group connected

[20] [redacted]

[21] The Securitibank collapse was complicated and politically sensitive. The government, through the State Insurance Office and the Government Life Insurance Office, held 22 per cent of Securitibank's shares, giving many of the 5,000 investors the impression the company was 'safe.' Securitibank's problems were due in part to government regulations – a ceiling on interest rates that had encouraged the merchant bank to skirt the rules and use Bills of Exchange to borrow from the public. Graeme Hunt, *Hustlers, Rogues and Bubble Boys: A History of White-Collar Mischief in New Zealand*, (Raupo Publishing (NZ) Ltd, Auckland, 2001) above n 2, at 70.

[22] The Bill holders felt disadvantaged. As a Bill holder there is no interest on the Bill. Other types of security would have interest accrue. It was felt fair to distribute the surplus to the Bill holders rather than follow the normal legal procedure of distributing it to the shareholders. All Securitibank creditors were paid in full with a bonus to some. There were high interest rates at the time of the liquidation and as Securitibank realised its assets it could take advantage of this. Mr Russell felt that there was a huge amount of money wasted through the process of this liquidation. He estimated that the liquidators may have spent $10 million unnecessarily.

[23] Mr Russell stated during an interview in January 2010 that 'Merbank' was simply an abbreviation for 'merchant bank'. Interview with Mr John Russell, Subject of thesis, (the author, Kawakawa Bay, 27 January 2010).

to the Privy Council decision in *Commissioner of Inland Revenue v Challenge Corporation Ltd,*[24] a major contributor to New Zealand tax avoidance jurisprudence at the time.

Figure 2: Former Securitibank Office Building, Auckland

It took 10 years and some 50 High Court cases to sort out the liquidation.[25] All external depositors were paid in full, thanks to out of court settlements with shareholders and the auditor.[26] Shareholders, including major institutional shareholders such as NZI Insurance, paid $1 million in settlement of allegations that Securitibank paid dividends out of capital. Auditor Barr Burgess & Stewart paid $4.3 million in settlement of negligence claims while denying liability.[27]

Mr Russell did not regret what happened at Securitibank, excepting that had he known in advance what would have happened he certainly would not have had so much of the investments in property.[28] Mr Russell still thinks that property is one of the best investments to have in New Zealand. Mr Russell stated that in spite of the fact that Securitibank eventually failed, it was a success in the sense that it created a new bill market which has been developed since. It also

---

[24] *Commissioner of Inland Revenue v Challenge Corporation Ltd* [1987] AC 155 (PC); [1986] 2 NZLR 513 (PC); (1986) 8 NZTC 5,219 (PC).

[25] Securitibank owed $31.5 million to outside creditors.

[26] Mr Russell is said to have contributed $100,000 to the $1 million collective out of court settlement by former Securitibank directors. The $100,000 amount was confirmed by Mr Russell during an interview in July 2011.

[27] "John Russell took novel approaches" *The National Business Review* (online ed., New Zealand, 8 May 1998) at 61.

[28] Interview with Mr J G Russell, above n 1.

loosened up the financial system which was totally in the grips of the banks and advanced New Zealand substantially in an economic sense compared to what it was before.[29]

After the well-publicised Securitibank collapse, being the largest corporate collapse in New Zealand history at the time, Mr Russell claimed it was difficult to have any employment opportunities and this led him to start Commercial Management Ltd, initially run out of a small office in Upper Queen Street, central Auckland, and ultimately run out of his family home in Pakuranga.

Mr Russell stated:[30]

> There was no point really in applying for a job anywhere…while you are successful you are a financial genius, if you are unsuccessful you are a crook…that is basically the way you are looked at in New Zealand.

Mr Russell further stated that he had "quite a few people come along to me and want me to rescue their businesses and all that sort of thing…"[31] He considered that if half the businesses that came his way could be turned around and saved, that was a very good percentage.

On 11 May 1977, the day he left Securitibank, Mr Russell went into business[32] with his own company, Commercial Management Ltd, as a management consultant/adviser "helping the small businessman who can't afford the full gamut of professional services."[33] In a rare newspaper interview at the time Mr Russell claimed the venture was financed by $30,000 from the sale of a property, as he personally had more than $50,000 locked up in Securitibank, and his extended family had $120,000 invested in the merchant bank.[34]

Commercial Management Ltd[35] began with just a few clients and experienced rapid growth.[36] Over the years 1972 to 1977 Mr Russell was also regarded as being in business on his own account in

---

29 Interview with Mr J G Russell, above n 1.

30 Interview with Mr J G Russell, above n 23. During the 1970s Mr Russell would occasionally give lunchtime addresses to the Auckland business community. His speeches were well received at the time.

31 Interview with Mr J G Russell, above n 23.

32 When he was employed at Securitibank Mr Russell carried out some accountancy and business advisory work on his own account. The Court of Appeal in *Russell v Commissioner of Inland Revenue* [2012] NZCA 128 at [13] stated that "We do not need to resolve the dispute as to the nature and extent of that work. It seems that while working for Securitibank the appellant earned consulting income personally and paid tax on that income."

33 Hunt, above n 2, at 72.

34 At 72.

35 Commercial Management Ltd was incorporated on 1 April 1977. Mr Russell was a director of the company, along with his wife. Mr Russell was the company secretary. Mr Russell held 9,999 shares in the company. It had a share capital of 10,000 ordinary $1 shares and the other share was held by another company controlled by Mr Russell, Money Market Securities Ltd. Money Market Securities Ltd was incorporated on 21 May 1964. Commercial Management Ltd was regarded by Wylie J as Mr Russell's alter ego: *Russell v Commissioner of Inland Revenue* (2010) 24 NZTC 24,463 (HC) at [124(a)].

addition to being employed by Securitibank. In *Russell v Commissioner of Inland Revenue*,[37] Wylie J stated that "It is helpful to consider the way in which Mr Russell traded prior to 1985."[38] Mr Russell consistently had described himself in his tax returns during this time as an accountant. His letterhead recorded his professional accountancy qualifications and he derived professional fees earned in his capacity as an accountant, in addition to his salary from Securitibank Ltd. Mr Russell's professional fees earned in his capacity as an accountant and his salary from Securitibank are detailed below.[39]

Table 1: Mr Russell's personal income sources: 1972 to 1977 (Source: *Russell v Commissioner of Inland Revenue* (2010) 24 NZTC 24,463 (HC) at [121].)

Year	Salary from Securitibank	Professional Fees
1972	$21,042.00	$1,291.00
1973	$22,500.00	$2,146.00
1974	$30,292.00	$2,150.00
1975	$51,971 (including directors fees)	$3,414.26
1976	$40,434.00	$2,105.00
1977	$43,110.00	$2,974.00

In a report prepared for the court on the liquidation of Securitibank, it was noted that staff at Securitibank were from time to time engaged in private work for Mr Russell; this included Securitibank accountants who undertook work for Mr Russell's clients for which Mr Russell personally collected fees.[40]

---

[36] It should be noted that companies could not hold themselves out as being chartered accountants, or trade as such. To the extent that they did so, they were committing an offence under s 32 [Improper use of terms implying membership of Society] of the New Zealand Society of Accountants' Act 1958. Membership of the Society was confined to registered persons, and the Act made it clear that admission was only open to real persons, and not to corporate entities. See: s 14(1) [Qualifications for membership of the Society], New Zealand Society of Accountants Act 1958. Mr Russell may have preferred to trade through a corporate structure to avoid any personal liability but in doing so he breached New Zealand Society of Accountants Rules in force at the time.

[37] *Russell v Commissioner of Inland Revenue*, above n 35.

[38] At [120].

[39] At [121].

[40] At [121].

In an Auckland Star article dated 15 April 1977, Mr Russell was quoted as saying that he had had private clients for some time, and that there were a lot of small businesses that were sticking with him. He had stated that he hoped to be off to a flying start with his new business, Commercial Management Ltd.[41] This business was described as one which would concentrate on providing financial and management consultant services, particularly advice on investment opportunities.[42]

Wylie J, in *Russell v Commissioner of Inland Revenue*[43] was referred to a passage in evidence by Mr Simon Judd, counsel for Mr Russell. Mr Russell asserted that he was "merely doing tax returns and the like for friends and family members"[44] while he was at Securitibank. Wylie J considered this assertion did not and could not stand if reference was made to the documents and statements made by Mr Russell at the time. The contemporaneous materials showed that Mr Russell's personal accountancy business was not insignificant. The income he had earned, as shown in Table 1, as a percentage of his then declared income, was not insubstantial.

The Taxation Review Authority (TRA) had concluded that Mr Russell was in business as an accountant/business advisor/financial consultant over the period 1972 to 1977. Judge Wylie agreed with that finding and in his Honour's view it was clear that this personal business provided the springboard for the years 1978 to 1984.[45]

In 1979 Mr Russell wrote a letter to a firm of accountants advising that he had been asked to provide taxation and consulting services, including the preparation of accounts and taxation returns, on behalf of some individuals and a company they were associated with. The letter was signed by Mr Russell as managing director of Commercial Management Ltd, and it was addressed on Commercial Management Ltd letterhead. The letter resulted in a complaint being made by the accountants concerned. They considered that Mr Russell was a director of, and a shareholder in, Commercial Management Ltd, and that Commercial Management Ltd was carrying on the business of accounting, in breach of the New Zealand Society of Accountants Rules in force at the time. The Society commenced disciplinary proceedings against Mr Russell in October 1979. The Disciplinary Committee found against him, with Mr Russell appealing the decision. The appeal was dismissed by the Appeal Committee in February 1980.

---

41 At [121 (e)]. In the article, Mr Russell referred to commencing a new business to be named CM Ltd, which was described as one which '*would concentrate on providing financial and management consulting services, particularly advice on investment opportunities, and it was not likely to deal in money as such.'*

42 Mr Russell considered that he was in the business of advancing money at the time. He sought to write off losses made in that regard against his income and he argued this point before the Taxation Review Authority (TRA) in *Case E31* (1981) 5 NZTC 59,204 (NZTRA) and in the High Court on appeal in *Russell v Commissioner of Inland Revenue* (1984) 6 NZTC 61,753 (HC).

43 *Russell v Commissioner of Inland Revenue*, above n 35.

44 At [122].

45 At [124].

The Disciplinary Committee imposed costs of $500 against Mr Russell, and the Appeal Committee imposed further costs of $250. Mr Russell paid the costs orders, and then claimed a tax deduction for the same, as well as legal expenses totalling $1402.60. The claim was disallowed by the Commissioner of Inland Revenue (Commissioner) with Mr Russell then unsuccessfully challenging the Commissioner's decision by way of case stated.[46]

Mr Russell established himself as an insolvency specialist, which is ironic considering that at Securitibank, he presided over what was then the largest corporate failure in New Zealand history. He has also become well known in the New Zealand tax community as the creator and defender of the 'Russell tax template', developed in the 1980s, and described as a mechanism to turn the 'water' of taxable receipts into the 'wine' of untaxed gains. Template-related issues are still being litigated some three decades later although it would appear that now in late 2012 the end of the litigation is in sight.

[46] At [124].

C Overview of Thesis

Initially the likely outcome of this thesis was a 'black letter' law analysis of Mr Russell's most relevant litigation from a jurisprudential perspective. I had tried for several months to contact Mr Russell without success. On the last day of the 2009 working year I tried once again from my office, but only got the Commercial Management answer phone message. I headed home that afternoon for the Christmas break and thought I would give it 'one more try' from home. To my delight Mr Russell answered the phone. I introduced myself briefly and told him about my research idea which focused on his life and asked whether he would be interested to meet.

It was a lovely early Christmas present when without hesitation Mr Russell agreed and a time to 'meet and greet' was arranged for early 2010. It was from the first meeting that I have enjoyed many times with Mr Russell including being his host in Christchurch in July 2011. I had organised for Mr Russell to be a guest at a lecture which was thoroughly enjoyed by students and staff.

Figure 3: Mr Russell and the author at Mr Russell's Kawakawa Bay home, 27 April 2010.

This thesis not only captures aspects of 'black letter' law, but also captures the time in which certain events happened. The tax avoidance environment was undoubtedly different in the 1970s compared to what it is now in a post *Ben Nevis*[47] environment.

[47] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

This thesis is a unique attempt at blending legal analysis and sociological aspects of tax compliance behaviour together. The thesis analyses the cases considered to best reflect Mr Russell's legal journey, as well as providing the reader with a taste of how Inland Revenue perceived Mr Russell in the early 1990s, and why they were so concerned about the impact he could have had on the New Zealand tax base. Tax as a discipline is clearly multidisciplinary and this thesis attempts to capture the thoughts of Mr Russell as he has discussed aspects of his life in a very personal way. A socio-legal approach, as discussed in the methodology section, was the one considered appropriate for this thesis.

The thesis is structured as follows. Chapter I provides an introduction and overview of the thesis topic. Chapter II discusses and supports the methodology chosen, as well as a review of tax specific methodology literature. This section also discusses the interviews held, both from their recording and transcription phases. Chapter III considers what is meant by the term 'compliance' in a tax context, with a brief discussion of the Inland Revenue Compliance Model and a focus on the 'game player' posture within this framework.

This thesis attempts to capture a legal journey that transcends over three decades. It is recognised that times change, therefore an historical background to New Zealand tax avoidance law is provided in chapter IV, with a focus on the context of the 1980s, the time at which the Russell template was invented and marketed. Chapter V introduces the perceptions of Inland Revenue towards Mr Russell and illustrates in part why they were concerned for the New Zealand tax base as a result of Mr Russell's activities. [redacted]

The so called Russell tax template may appear relatively straightforward diagrammatically. Chapter VI discusses how the template was first discovered by Inland Revenue, indirectly by way of a Department of Justice warrant issued for files located at Mr Russell's Pakuranga property. Available tax losses were an integral part of the template scheme. The majority of losses utilised came from one source briefly referred to. In addition this chapter looks at a couple of cases that tested aspects of the template, referred to as 'pre-template' cases. The remainder of chapter VI introduces the first two template cases, both known as 'Track A' assessment route cases where the profit company was initially assessed, but with the 'cupboard being bare'. In essence the company was stripped of its assets.

The 'Track B' cases, also discussed in Chapter VI, where the shareholders of the profit company were to be taxed are discussed next. The most well-known 'Track B' case is that of the Miller and O'Neil family and their clothing manufacturing business based in Auckland. Mr Russell personally knew many of the template participants and the Millers and O'Neil's were no exception. [redacted]

[redacted]

Ultimately the template was held to be 'blatant' tax avoidance.

After having limited success in assessing under the 'Track A' and 'Track B' route, Inland Revenue then embarked on a new approach claiming the 'the whole thing is a sham'. Unfortunately for Inland Revenue the officers giving evidence on the Commissioner's behalf had different ideas as to what 'Track C' was actually assessing. Chapter VII introduces a summary of the different track routes. This is a complicated part of the thesis with some litigation still on-going.

Chapter VIII introduces perhaps the most controversial topic, that of whether Inland Revenue as an organisation have been conducting a vendetta towards Mr Russell purely motivated to destroy him, both by way of monetary penalty and public shame. Unreasonable requests for information, backtracks on settlement even years after the parties thought they had legitimately settled, and accusations of the wrong witnesses put on the stand to give evidence solely to frustrate Mr Russell's case and add to the time and cost of litigation are considered in this chapter.

Although Mr Russell is not alone in accusing Inland Revenue of abusing their power, he is perhaps unique in having the same Authority hear so many of his cases. When 'Track E', his personal assessment case was heard in the TRA by the same Authority as the substantial number of his client's cases, he claimed that the outcome could be 'predicted now'. Chapter IX considers the legal merits of judicial recusal in the insular New Zealand tax environment.

Chapter X, the discussion chapter, considers Mr Russell's impact on jurisprudence, both substantive and procedural. Being an investigative analysis it is clearly impossible to refer to all incremental contribution, in essence global comments are made. This chapter also considers Mr Russell's impact on the general policy and procedure of Inland Revenue.

This thesis discusses two distinct tax avoidance arrangements, as determined by the courts, namely the Russell tax template, and the related but yet distinct tax avoidance arrangement in relation to Mr Russell personally, specifically the ways the income attributed to Mr Russell's group of companies was dispensed. In no way was it intended to argue the merits of what may or what may not constitute tax avoidance with Mr Russell. The Privy Council confirmed in 2001 that the Russell template was blatant tax avoidance.[48]

This thesis not only traces some of the legal journey that Mr Russell has endured, but also seeks to capture and understand what drives a person to continue for so many years in litigation. Often the

[48] This phrase was used in *Case R25* (1994) 16 NZTC 6,120 (NZTRA) and confirmed in *O'Neil v Commissioner of Inland Revenue*, above n 2.

drive comes from a person who truly believes in their 'cause'; otherwise the stamina to continue would soon be exhausted. Why did Mr Russell not just 'walk away' from it all several years ago to enjoy a more peaceful retirement? It is easy to dismiss Mr Russell as someone who has just 'tried it on' with tax laws and lost, but this thesis reveals that his story is just not that simple. Rather, it reveals that he was a person who invented his template in a time prior to any significant tax avoidance litigation and even though this is no excuse, it is easy to see how a tax structure designed in a pre-*Challenge*[49] environment was initially justified by Mr Russell.

Chapter XI sought to capture Mr Russell's concluding reflections, and whether he held any regrets. Chapter XII documents future research topics that have become apparent as a result of this investigative thesis. Finally chapter XIII provides a brief conclusion.

A Bibliography and Appendices conclude the thesis, with a redacted copy of the template documents that have been the source of so much litigation. The template documents were essentially the same for all applications.

[49] See *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 (HC); (1984) 6 NZTC 61,807; (1984) 8 TRNZ 1; *Commissioner of Inland Revenue v Challenge Corporation Ltd* [1986] 2 NZLR 513 (CA); (1986) 8 NZTC 5,001 and *Commissioner of Inland Revenue v Challenge Corporation Ltd*, above n 24. This case is discussed further in Chapter IV of the thesis.

Chapter II
Methodology

II Methodology

A Introduction

This thesis essentially adopts a 'black letter'[50] analysis of several of the more prominent cases surrounding the 'Russell template'. The cases selected are the ones that illustrate Mr Russell's legal 'journey' most clearly and are relevant to be included in a thesis of this nature. It is not an in-depth chronological condensation of all of his cases.

A black letter discourse of the cases and any incremental jurisprudential development alone would not provide the richness that is found by including the views of Mr Russell on the events discussed. It is recognised that the narrative is from Mr Russell's perspective in many places. This has been 'balanced' by both internal Inland Revenue documents and case law.

Mr Russell was interviewed by way of a series of semi-structured interviews where generally a few specific questions were asked and then followed Mr Russell's 'tangents of thought' with interviewer probes. Mr Russell was initially interviewed at his home in Kawakawa Bay, in part to have him at ease in his own surroundings, but also to be able to see him by fitting in with his busy litigation schedule. He was also able to locate various documents from his home office that I was hoping to have access to such as the template documentation, [redacted] The initial schedule of questions is contained in the appendix of this thesis; however, the digital voice recordings of the interview (held on file) show that many tangents were taken at times.

I sought to capture Mr Russell's oral history by way of narrative, getting him to express his personal experiences and feelings related to him growing up from a young age, through his early career, the Securitibank days, the interaction with Inland Revenue over the years, and the toll that the litigation has taken on him and his family. As can be appreciated a tremendous amount of material obtained during the interviews is well beyond the scope of this thesis and will be used in further research. I was also fortunate to be able to interview Mr Russell formally in a recording studio at the University of Canterbury in July 2011.[51]

---

[50] A 'black letter' approach is typified by the systematic process of identifying, analysing, organising and synthesizing statutes, judicial decisions and commentary.

[51] Interview with Mr J G Russell, above n 1. Even with all the best of intentions in planning Mr Russell's visit to the University of Canterbury unfortunately due to heavy snowfalls in Christchurch Mr Russell had to spend hours patiently waiting at the Auckland Domestic Airport terminal. Although our interview time was shortened essentially by one full day, the time in Christchurch with Mr Russell was very fruitful.

A difficulty with this research was that I had the transcripts from conversations with Mr Russell and then, due to the huge number of cases, I had to locate the most relevant cases to tell the story and relate back to the transcript. Initially, and somewhat optimistically, it was thought that an overall synopsis of Mr Russell's litigation, although a big task, would be quite manageable. Anything concerning the Russell litigation is anything but that. The inability to access any information from Inland Revenue, due to s 81 Tax Administration Act 1994 (TAA 1994) secrecy provisions, meant that care had to be taken to confirm any statements or claims made during the interviews with a court case to verify what was claimed. Mr Russell has been very forthcoming in his conversations with me and every issue referred to in the transcripts has been able to be verified to some degree by way of triangulation, either by reading through the relevant court cases or other documentation.

Another difficulty with this thesis has been the on-going nature of the litigation.[52] Some case issues have been complex and although procedural issues have not been thoroughly examined in this thesis; nevertheless procedural issues have permeated many of the substantive tax cases considered. By way of example in the *FB Duvall* litigation there were seven interim judgments issued by Baragwanath J on various procedural matters. It has been a deliberate choice to confine much of the case law mentioned to explain the 'story' of the tax template from a substantive tax perspective.

Due to the vast number of cases centered on Mr Russell's tax activities, this thesis has attempted to provide the reader with an understanding of the 'story' of Mr Russell and the tax template. It is simply not feasible to consider every Russell related case in its entirety.

Probably the biggest difficulty with this thesis has been to limit the content. The first draft version written contained in excess of 100,000 words and still more and more was being uncovered during discussion with Mr Russell and analysing the cases, as well as the on-going litigation. It seemed that every time I asked one question of Mr Russell his answer would sometimes raise five more questions to be considered. My principal supervisor was amenable to the thesis word count exceeding 70,000 words due to the richness of the material that was forthcoming.

A highlight has also been to attend several court hearings, (both the High Court and Court of Appeal), and hear Mr Russell present his case clearly and calmly. [redacted][53] [redacted]

[52] By way of illustration in August 2012 the statutory criteria for leave to appeal to the Supreme Court was not established by Mr Russell in *Russell v Commissioner of Inland Revenue* [2012] NZSC 73, (2012) 25 NZTC 20,140. This was the latest case in the Track E litigation spanning tax years from 1985 to 2000. In late December 2011 in *FB Duvall Ltd v Commissioner of Inland Revenue* (2011) 25 NZTC 20,101 (HC), a judicial review case, where FB Duvall were held to have established grounds for judicial review with the Commissioner ordered to reconsider their refusal to accept late GST objections from FB Duvall Ltd. Her Honour Ellis J reserved leave to the plaintiffs in respect of a s 99(4) ITA 1976 matter. The FB Duvall litigation stemmed from GST periods dating back to 31 August 1987. In December 2012 in *Douglas v Commissioner of Inland Revenue* [2012] NZCA 486, the Court dismissed an appeal in template related litigation addressing amended assessments dated back to 1993.

[53] [redacted]

[redacted] **Appendix 1** contains the initial letter sent to Mr Russell in 2010 by the author. **Appendix 2** contains the University of Canterbury Human Ethics approval for this research.

B Conducting Legal and Tax Research - A Review of the Literature

Lamb[54] argues that tax is not a discipline in itself but rather a multidisciplinary field of research, or clustering of research interests. Tax is a social construct that can be studied through many and various disciplinary lenses. In seeking to understand almost any aspect of taxation, we need to bear in mind that it is much more than the study of the revenue law itself. A socio-legal approach is supported by Cane and Kritzer.[55]

Legal researchers may be well qualified to study the meaning of the 'letter of the law,' but find that they are not so well equipped to study how people respond to the law.[56] Doctrinal research is the traditional or 'black letter' approach, whereas on the other hand, non-doctrinal research according to Pearce et al, is research 'about law' rather than 'in law'.[57] Pearce et al contend that non-doctrinal research conduct and design should be more consistent with approaches used in other disciplines and that data should not be limited to traditional legal resources.

Salter and Mason[58] support the existence of a distinction between doctrinal and non-doctrinal legal research, and argue that the two approaches do not have to be mutually exclusive. The existence of more than one acceptable approach to research within the discipline of law can provide opportunities for researchers to design and conduct research that makes a worthwhile contribution to the body of knowledge.

A particular reason justifying the research approach to this thesis is supported by Salter and Mason.[59] They state that students considering alternatives to the adoption of a purely black letter approach to the conduct of dissertation research might want to explore the implications of Professor Roger Cotterell's claim that: [60]

---

54 M Lamb, "Interdisciplinary Taxation Research – An Introduction" in M. Lamb, A. Lymer , J. Freedman and S James (eds), *Taxation: An Interdisciplinary Approach to Research* (Oxford University Press, Oxford, 2005) as cited in Margaret McKerchar, *Design and Conduct of Research in Tax, Law and Accounting*, (Thomson Reuters/Lawbook Co., Sydney, 2010) at [1.50].

55 Peter Cane and Herbert M. Kritzer, *The Oxford Handbook of Empirical Legal Research*, (Oxford University Press, Oxford, 2012) at 1018.

56 McKerchar, above n 54, at [1.50].

57 D. Pearce, E. Campbell and D. Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Commission* (AGPS, Canberra, 1987) at 309 as cited by McKerchar, above n 54, at 9 describes doctrinal or typical 'black letter law' research as 'typified by the systematic process of identifying, analysing, organising and synthesising statutes, judicial decisions and commentary. It is usually a library-based undertaking, focused on reading and conducting intensive, scholarly analysis as good lawyers are aptly trained to do.'

58 M. Salter and J. Mason, *Writing Law Dissertations, An Introduction and Guide to the Conduct of Legal Research*, (1st ed, Pearson Education Ltd, Essex, 2007) as cited by McKerchar, above n 54, at 9.

59 M. Salter and J. Mason, *Writing Law Dissertations, An Introduction and Guide to the Conduct of Legal Research*, (1st ed, Pearson Education Ltd, Essex, 2007) at 40.

60 Roger Cotterell, *Law's Community* (Oxford: OUP, 1995) at 296,314 as cited in M Salter and J Mason, above n 59, at 119.

> All the centuries of purely doctrinal writing on law has produced less valuable knowledge about what law is, as a social phenomena, and what it does than the relatively few decades of work in a sophisticated modern empirical socio-legal studies…Socio-legal scholarship in the broadest sense is the most important scholarship presently being undertaken in the legal world. Its importance is not only in what it has achieved, which is considerable, but also in what it promises.

Furthermore, Hutchinson[61] asserts that the discipline of law is changing to a more outward-looking focus encompassing interdisciplinary approaches to research. As a methodological approach, doctrinal research is typically based on the 'black letter' (or literal analysis) of formal legal rules and principles. It tends to rely on a distinctly deductive form of legal reasoning and on the researcher's ability to develop arguments and provide reasoning's that are based on the law (which includes case law).[62] This is achieved by providing 'a detailed and highly technical commentary upon, and systematic exposition of, the content of legal doctrine'.[63] In spite of the fact that doctrinal legal research is still regarded as the norm by many legal researchers, there is evidence of the softening of the traditional boundaries.[64] This is attributed to a growing recognition that law is a social construct and does not exist in a doctrinal vacuum.[65] Hutchinson describes jurisprudence, the theoretical, philosophical approach to legal research, as lacking relevance to the real world.[66]

Research is about discovery. McKerchar writes that "[research] is rarely about truth, because realistically there is no single absolute truth."[67] It is virtually impossible to find unambiguous explanations for human behaviour. McKerchar concedes that "perhaps the one absolute truth is that people are very complex beings."[68] Research shapes who we are and the society we live in. While research in tax, law and accounting can still be scientific, it would perhaps more accurately fall into the category of social science since tax, law and accounting are social constructs rather than elements of nature.[69]

---

61 T. Hutchinson, *Researching and Writing in Law* (3rd ed, Thomson Reuters/Lawbook Co., Sydney, 2010) at 11 as cited in McKerchar, above n 54, at 9.

62 McKerchar, above n 54, at 115.

63 M. Salter M and J. Mason, above n 59, at 49.

64 McKerchar, above n 54, at 116.

65 T. Hutchinson, *Researching and Writing in Law* (3rd ed, Lawbook Co., Sydney 2010) at 7 as cited in McKerchar, above n 54, at 116.

66 At 116.

67 McKerchar, above n 54, at 11.

68 At 11.

69 At 14.

The traditions of research theory are neither uniform, universally accepted nor fixed.[70] Legal positivism is well recognised within the discipline of law as contributing to jurisprudence or the understanding of the philosophy of law.[71] Doubts about positivism have been expressed by both accounting[72] and law researchers. In respect of the law, researchers have argued that positivism fails to address the moral power of law to make people obey the obligations so created.[73] Therefore, while positivism is relevant to doctrinal or black letter law, it is perhaps inappropriate for socio-legal research which requires an understanding of people's behaviour.[74] McKerchar writes that it is true that the body of literature on research design is focused heavily on the sciences and social sciences and is considerably less relevant to the discipline of law. In terms of paradigms, McKerchar states that it is reasonable to posit that legal research could be anywhere on a continuum from the objectivity of positivism to the subjectivity of interpretivism.

In terms of methodological approach, a case study generally involves a researcher undertaking an in-depth exploration of a program, an event, an activity, or a process concerning one or more individuals. The case is usually bound by time and activity and the researcher collects detailed information using a variety of data collection procedures.[75]

This thesis is an extensive case study comprising of several in-depth interviews with Mr Russell in his home, at the University of Canterbury when Mr Russell was flown to Christchurch, and an in-depth analysis of documentation, [redacted]

A case study allows a researcher to perform a comprehensive analysis of a contemporary phenomenon within its real life context. Case studies are the ideal method for the 'how' and 'why' type research questions asked in this research.[76] From an ontological perspective the author agrees that reality is socially constructed, rather than objective and external to the subjects and the researcher.[77] It is impossible to be separated from the subject under study, and reality can only be objectified through human interaction when people engage and ascribe meaning to it. From an

---

70 At 67.

71 J. Coleman, "Beyond Inclusive Legal Positivism" (2009) 22(3) *Ratio Juris* 359 and S. Perry, "Beyond the Distinction Between Positivism and Non-Positivism" (2009) 22(3) *Ratio Juris* 311 as cited in McKerchar, above n 54, at 72.

72 Gaffikin argues that positivism and its reliance on scientific method restricts (rather than extends) the search for knowledge, particularly in the development of theory. See M. Gaffikin, "Being in Accounting for a Time" in J. Baxter and C. Poullaos, Practices, Profession and Pedagogy in Accounting (Sydney University Press, Sydney, 2009) as cited in McKerchar, above n 54, at 73.

73 S. Perry, "Beyond the Distinction Between Positivism and Non-Positivism" (2009) 22(3) *Ratio Juris* 311 as cited in McKerchar, above n 54, at 73.

74 McKerchar, above n 54, at 73.

75 J. Cresswell, *Research Design* (2nd ed, Sage, Thousand Oaks, 2003) at 15 and F. Fowler, *Survey Research Methods* (2nd ed, Sage, Newbury Park, 1993) at 11 as cited in McKerchar, above n 54, at 102.

76 R.K. Yin, *Case Study Research: Design and Methods* (3rd ed, Sage Publications, Beverley Hills, 2003) at 26.

77 Wai Fong Chua, "Radical Developments in Accounting Thought" (1986) 61 The Accounting Review 601.

epistemological perspective it is the author's belief that the researcher is part of the knowledge discovery process. Consequently, the author believes that the knowledge created is based on the researcher's own subjective interpretation of the social world as coloured by the researchers own views, personal experiences, existing knowledge and beliefs.

Narrative research examines the experiences of individuals as told in stories.[78] Clandinin and Connelly describe narrative research as a way of understanding the world based on the view that life is 'filled with narrative fragments that are enacted in storied moments of time and space.'[79] Narrative research seeks to interpret or make meaning of an individual's life experience, both over a period of time and as a whole.[80] Where stories are told in person, the relationship between the teller and the researcher is very important. The teller, in this case, Mr Russell, places a great deal of trust in the researcher who, in turn, assumes a great deal of responsibility.

McKerchar states that a story told in narrative research has three important characteristics that need to be understood. First, the story as told to the researcher may contain elements of both fact and fiction as it is recollected from the perspective of the teller and may possibly be 'muddled'.[81] Secondly, the story is usually told in a specific social context and for a particular purpose.[82] It is not necessarily the 'whole truth and nothing but the truth'. It is 'truth' as perceived (or at least conveyed) by the teller and to a lesser degree what is interpreted by the researcher in the exchange.

McKerchar writes that "even if there does appear to be evidence (implicit and/or explicit) of causal relationships in the story told, given these two important characteristics, the researcher needs to exercise care in the formulation of meaning".[83] Thirdly, the story told is effectively retold by the researcher, so the end result is a collaborative piece of work that combines views from the life of the individual (or subject), as the story is relived, with those of the researcher.[84] In retelling the story the researcher needs to be mindful of any relevant ethical considerations, including the sensitivity of the story and who may be hurt in the telling.[85]

---

78 P. Liamputtong, *Qualitative Research Methods* (2nd ed, Oxford University Press, Melbourne, 2005) at 111 as cited in McKerchar, above n 54, at 112.

79 D.J. Clandinin and F.M. Connelly F. M, *Narrative Inquiry: Experience and Story in Qualitative Research* (Jossey-Bass, San Francisco, 2000) at 17 as cited in McKerchar, above n 54, at 112.

80 At 112.

81 At 113.

82 J. Elliott, *Using Narrative in Social Research: Qualitative and Quantitative Research* (Sage Publications, London, 2006) at 15 as cited in McKerchar, above n 54, at 113.

83 McKerchar, above n 54, at 113.

84 D.J. Clandinin and F.M. Connelly, *Narrative Inquiry: Experience and Story in Qualitative Research* (Jossey-Bass, San Francisco, 2000) at 71 as cited in McKerchar, above n 54, at 113.

85 At 113.

It is important to mention my own personal bias limitation in this thesis. In the telling of events to me I have interpreted what has been said naturally with my own bias. I have sought to clarify every statement made where a legal case has been referred to, to analyse the material from more than one source. I have developed a friendship with Mr Russell, and appreciate his sense of humour. I have attempted to always balance what has been said to me by Mr Russell with factual material such as case law, or other documentation. I have attempted to maintain professional distance.

C Interviewing Mr Russell

> *"…once a story is told, it cannot be called back. Once told, it is loose on the world. So you have to be careful with the stories that you tell. And you have to watch out for the stories that you are told."*[86]

Minichiello et al[87] explain the primary focus of an in-depth interview is to understand the significance of human experience, as described from the interviewee's perspective and interpreted by the interviewer. Patton[88] describes this as finding out what is going on in someone's mind. Some of this interpretation will be based on what was said, but the researcher has to also observe and interpret what was not said, using clues such as body language, eye contact, reactions, innuendo and so forth. Liamputtong and Ezzy[89] describe a good interview as resembling a good conversation with a two way flow of dialogue where the interviewer asks questions, actively listens, responds and encourages the interviewee to open up and share more of their experiences.

The planning of the interviews with Mr Russell was restrained by distance with Mr Russell being based outside of Auckland, increasing travel costs for the interviewer. The initial interviews were conducted at Mr Russell's home where he was more likely to be relaxed in situ, as well as having access to material that he may wish to refer to. The interviews were quite lengthy time wise, usually recordings were for well over an hour, with upwards of five to six hours per day, although Mr Russell at numerous times stressed that he was fine with that. The first interview was a 'meet and greet', building trust for the subsequent interviews. The interviews at Kawakawa Bay were recorded by way of voice recorder; the later interviews at the University of Canterbury were in a more formal setting and recorded on DVD.

A formal style of interview, as advocated by Patton,[90] is where the interviewer builds rapport, but remains neutral in respect of the content of what is being discussed. Fontana and Frey[91] argue that neutrality is not only unnecessary, but almost impossible for the interviewer to achieve.

---

86 T. King, *The Truth about Stories: A Native Narrative* (Anansi Press, Toronto, 2003) at 10.

87 V. Minichiello, R. Aroni and T. Hays, *In Depth Interviewing* (3rd ed, Pearson Education, Sydney, 2008) at 11 as cited in McKerchar, above n 54, at 154.

88 M.Q. Patton, *Qualitative Research and Evaluation Methods* (3rd ed, Sage, Thousand Oaks, 2002) at 341 as cited in McKerchar, above n 54, at 154.

89 P. Liamputtong, and D. Ezzy, *Qualitative Research Methods* (2nd ed, Oxford University Press, Melbourne, 2005) at 55 as cited in McKerchar, above n 54, at 154.

90 M.Q. Patton, *Qualitative Research and Evaluation Methods* (3rd ed, Sage, Thousand Oaks, 2002) at 365 as cited in McKerchar, above n 54, at 157.

91 A. Fontana and J. Frey, "The Interview: From Neutral Stance to Political Involvement" in N. Denzin and Y. Lincoln (eds), *The Sage Handbook of Qualitative Research* (3rd ed, Sage, Thousand Oaks, 2005) at 696 as cited in McKerchar, above n 54, at 157.

I have enjoyed the time I have spent with Mr Russell, both initially interviewing him at his home in Kawakawa Bay, but also having him come to Christchurch for the formal interviews and being a guest lecturer in a third year Advanced Taxation class. I have also spent time with Mr Russell in the Court of Appeal[92] 'Track E' case, purely as a passive observer. It is only natural as a concomitant of spending time in this manner that one sees the impact of the on-going litigation on Mr Russell. Consequently, one can hardly remain neutral in relation to the personal toll.

There are clearly different approaches to questioning in an interview. Patton[93] identified different types of questions that could be asked in an interview, including those about experience and behaviour, those about opinion and values, and questions about the background and demographics that may help the researcher understand the situation of the interviewee. Patton explains that it may be useful to consider how the dimensions of time (past, present and future) may intersect with several types of questions: how the interviewee felt in the past; how they feel now; and how they might feel in the future.[94] This type of questioning flowed from the interviews with Mr Russell naturally. Mr Russell emphasized certain aspects in our interviews and cases that he considered important, issues such as the alleged vendetta, the impact of the Bill of Rights Act 1990 and s 6 TAA 1994, where he felt he had made the most contribution to legal jurisprudence.

Liamputtong[95] emphasizes the importance of setting the scene and building trust for the interview and to allow the interviewee to talk at length and to choose where to begin and which parts of the story to emphasize. This came naturally with Mr Russell. It was also prudent to reflect back after the substantive interviews and check that the main responses and interpretations were understood. Mr Russell was very patient and clear in telling his story.

A semi-structured interview can be challenging for a researcher, to simultaneously listen to what is said (and what is not said), observe what is seen, make notes that capture the essence of the data, and still 'manage' the conversation.[96] Analysing qualitative data is as much an art as it is a science.[97]

---

92 *Russell v Commissioner of Inland Revenue*, above n 32.

93 M. Q. Patton, *Qualitative Research and Evaluation Methods* (3rd ed, Sage, Thousand Oaks, 2002) at 348 - 351 as cited in McKerchar, above n 54, at 157.

94 The other questions identified by Patton included those about knowledge and the senses, such as what the interviewee sees or hears.

95 P. Liamputtong, *Qualitative Research Methods* (3rd ed, Oxford University Press, Melbourne 2009) at 47 and 52 as cited in McKerchar, above n 54, at 157.

96 McKerchar, above n 54, at 195.

97 At 212.

Narrative analysis is used to present a chronologically linked chain of events in which one or more individuals have had an important role. It is used to extract a story from qualitative data.[98] There are three tools used in narrative analysis: path dependency, periodisation and historical contingency. These tools help the researcher decide how to make sense of the data and present the story in a meaningful way. Path dependency is used to explain a chain of events (such as tax reform or jurisprudence over time, both of which are applicable to the Russell story) where one event has triggered another. It usually begins with an outcome and then traces backwards to demonstrate how one event affected another.

Periodisation is a tool often used by historical comparative researchers who, in order to tell their story, group data into what they regard as significant and distinctive time periods in the context of the development of a particular theory or concept. Historical contingency is a tool of narrative analysis whereby a unique and unexpected historical event is studied to understand why it occurred. These tools are both useful in the context of the Russell story. The prevalence of mass marketed tax avoidance schemes is an example of where historical contingency qualitative analysis would be useful and periodisation is a useful tool to see the changing attitudes to tax avoidance since the early 1960s to the present day.

This thesis has attempted to capture Mr Russell's story from his early beginnings, to his success and the ultimate failure of Securitibank, then the journey from the start of Commercial Management to the final days of template related litigation some three decades later. All the while attitudes to tax avoidance underwent a sea change since the pre-*Challenge* days.

Mr Russell was subsequently interviewed and professionally filmed at the University of Canterbury in late July 2011. The recordings are going to form part of a DVD that will be used in future third year, and Honour's university programme classes. Although there was a formality to the recordings being under professional conditions, the rapport previously built up with Mr Russell made for the interviews to flow well from the outset, in a relaxed and informative fashion. I have spent many hours listening to these professionally recorded DVDs.

A copy of the draft questions for the 2010 Kawakawa Bay interviews are in the appendix of this thesis as **Appendix 3**.

[98] W. Neuman, *Social Research Methods* (6th ed, Pearson education, Boston, 2006) at 476 as cited in McKerchar, above n 54, at 231-232.

D The Transcription of the Interviews

The interviews conducted at Mr Russell's Kawakawa Bay home were all digitally audio recorded and I personally transcribed the recordings upon my return to my office. To provide an insight into the length of the interviews, the Kawakawa Bay interviews alone once transcribed were in excess of 92,000 words. This took a substantial amount of time; however, it also allowed me to reflect once again on what Mr Russell had told me. It also provided the platform to base further questions. It was invaluable to be able to do this as so much was covered in each interview. Liamputtong[99] describes the in-depth interview as an exciting method for undertaking strong and valuable research.

A semi-structured interview has its main strength is its flexibility, in that the questions are not fixed and there is the opportunity to probe and clarify meanings. It must always be remembered that the interviewer is being told what the interviewee wants to tell the researcher and care has to be taken that for various reasons, what is told may not always be true. With regard to Mr Russell I validated his comments made during the interviews with reference to relevant case law or other documents where appropriate.

As part of my research I also attended a High Court hearing *Russell v Commissioner of Inland Revenue*[100] (Track E litigation) before Wylie J in the Auckland High Court in late July and early August 2010. Mr Russell was unable to attend this particular hearing due to being in hospital recovering from back surgery. I was fortunate to be able to spend time talking to Inland Revenue counsel, as well as Mr Russell's legal advocate, Mr Simon Judd.[101] In February 2012 I was able to attend the 'Track E' Court of Appeal case *Russell v Commissioner of Inland Revenue*[102] where Mr Russell presented his own case calmly and clearly. It has been noted that Mr Russell is very affable in the courtroom.

Qualitative research is not about seeking one absolute truth, but a portrayal of an experience, culture or phenomenon that is acknowledged as subjective. In this thesis it is the experience of a taxpayer and his interaction with a powerful revenue authority (Inland Revenue) over a period of thirty years. I have sought to get a taxpayer perspective.

---

99 P. Liamputtong, *Qualitative Research Methods* (3rd ed, Oxford University Press, Melbourne 2009) at 61 as cited in McKerchar, above n 54, at 161.

100 *Russell v Commissioner of Inland Revenue*, above n 35.

101 Mr Russell has been represented initially by Mr Bruce Grierson, then by Mr Gary Judd QC, and latterly by Mr Simon Judd, Gary Judd's son.

102 *Russell v Commissioner of Inland Revenue*, above n 32.

E Limitations

A clear limitation with this thesis is that Mr Russell's cases span three decades and he has been involved in a substantial volume of litigation. [redacted] Mr Russell has (so far) been denied leave to the New Zealand Supreme Court. A difficulty with this thesis has been to consider the sheer volume of cases which are related to Mr Russell.

Since 2005 there has been a significant amount of litigation headed towards a conclusion. It has been difficult to consider which cases best tell Mr Russell's 'story', with so many cases to not only choose from but also consider in detail. Getting the balance right over what to emphasize and expand on has been a challenge. Mr Russell has regarded aspects of the alleged vendetta towards him by Inland Revenue to be of significance, although the courts have held consistently that no vendetta has been established. I have therefore attempted to allow adequate coverage of issues raised during the interviews and have attempted to balance them as I have seen appropriate.

Perhaps a limitation that became apparent as the thesis progressed was the continuing nature of the litigation. By way of example the FB Duvall litigation, which is still on-going, had its origins with tax periods audited by Inland Revenue in 1987. A significant amount of litigation has been based on minor procedural matters and it has been a mammoth task to say the least to separate the 'wheat from the chaff' at times in relation to certain litigation. The substantive 'Track' litigation, commencing with a court case under 'Track A' in 1990 is still on-going with 'Track E' finding somewhat of a conclusion in 2012, although Mr Russell has recently hinted at a 'Track F'. The thesis has felt like a 'moving target' at times.

One aspect that I particularly noted during the Christchurch interviews in July 2011 was that Mr Russell's memories of earlier events were on occasion hard to recall, which is understandable due to not only the time that has passed, but also the large number of events that have transpired between him and Inland Revenue. I was surprised at how well Mr Russell could in fact recall earlier events. It is important to note that Mr Russell is now aged in his late 70s.

On a personal note the toll of the Christchurch earthquakes has had a marked impact on this thesis from the perspective that in pre-earthquake days my office contained all of my research material for this thesis in one place. In February 2011 the Commerce Building where our offices were located had to be immediately evacuated with all material unable to be accessed for several months. When the building had to be cleared it was scheduled to take place in the first week of the commencement of the second semester just prior to the start of our third year law course. All office material had to be hastily packed away with some material held in storage and some material simply packed in boxes and stored at home. It is true to say that at times I have spent an inordinate

amount of time simply just looking for material previously packed away, or having to source the material afresh.

This thesis has survived a period of teaching in tents, Saturday morning tax lectures, ‘hot desking’ for several months, an open plan office for well over 12 months, and two colleagues being either seconded to other roles or on sabbatical/study leave. It has survived the absence of an academic office providing a quiet study space.

Chapter III
Compliance

III Compliance

A Introduction

Mr Russell has been involved in a long running dispute with Inland Revenue for many, many years, perhaps longer than any other single Inland Revenue litigant. In fact, his litigation history with Inland Revenue spans more than three decades. Although this thesis has a distinct 'black letter' law component, it would not be complete unless the Inland Revenue Compliance Model[103] was introduced, and an analysis of it considered in respect of Mr Russell and his unceasing motivation to keep battling with Inland Revenue. A question that 'black letter' analysis would fail to provide an answer to is an attempt to understand what it is that drives a person for so many years to remain in conflict with such a powerful regulatory body. However, first a definition of what is 'compliance' should be established.

B What is Compliance?

There is no universal definition of compliance[104] in a tax context although it is usually cast in terms of the degree to which taxpayers comply with the tax law. This is not an easy concept to measure but one suggestion is that the degree of non-compliance may be measured in terms of the 'tax gap'. This represents the difference between the actual revenue collected and the amount that would be collected if there were one hundred per cent compliance. The basic concept of the 'tax gap' for non-compliance has been held to be inadequate with both the definition and its measurement being far too simplistic for practical policy purposes as a successful tax administration requires taxpayers to cooperate in the operation of the tax system.

Richardson and Sawyer[105] considered the definition of compliance, referring to an earlier seminal review of the tax compliance literature at the time by Jackson and Milliron,[106] who adopted the

---

[103] The Inland Revenue Compliance Model is based on the Australian Taxation Office (ATO) Compliance Model. Originating in the Cash Economy Task Force (1998), the Compliance Model drew on the work of regulatory scholars at the Australian National University (ANU) as well as on the vast literature on tax compliance. Consistent with this literature, the Task Force urged the ATO to better understand not only the business profiles of taxpayers but also the nature of the industry they belong to, the economic factors that impinge on that industry and society more broadly, and the psychological and sociological factors that frame taxpayers' decisions or non-decisions about the actions they will take to meet their tax obligations (Valerie Braithwaite, "A New Approach to Tax Compliance" in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, Hants and Burlington, 2003).

[104] Rebecca Chieh Wu, "*A Study on the Appropriateness for adopting 'Universal' Definitions for Tax Compliance and Non-Compliance: A New Zealand Case Study Approach"*, (Master of Commerce thesis, University of Canterbury 2012).

[105] M. Richardson and A.J. Sawyer, "A Taxonomy of the Tax Compliance Literature: Further findings, problems and prospects" (2001) 16 ATF 137 at 142.

definition of a compliant taxpayer as one who files an "accurate, timely and fully paid return without IRS enforcement efforts."[107] Richardson and Sawyer write that "although this definition allows for both intentional and unintentional compliance, it does not clarify whether the taking of an aggressive tax position on an ambiguous issue represents noncompliance if the revenue authority or courts fail to accept the treatment at a later date."[108] It could be assumed that Mr Russell, when filing his tax returns either for himself or on behalf of his clients, was taking a position, although aggressive, was not at that stage determined as non-compliance either by the revenue authority or by the courts.

Roth, Scholz and Witte,[109] provide a definition of compliance, which takes this issue into account:

> Compliance with reporting requirements means that the taxpayer files all required tax returns at the proper time and that the returns accurately report tax liability in accordance with the Internal Revenue Code, regulations, and court decisions applicable *at the time the return is filed*. (emphasis added)

The Roth, Scholz and Witte definition of compliance is favoured in many studies. James and Alley[110] questioned whether 'compliance' refers to voluntary or compulsory behaviour. If taxpayers 'comply' only because of dire threats or harassment, or both, this would not appear to be proper compliance even if one hundred per cent of tax was raised in line with the "tax gap" concept of non-compliance.

James and Alley rather optimistically suggest that it might be argued that successful tax administration requires taxpayers to comply willingly, without the need for enquiries, obtrusive investigations, reminders, or the threat or application of legal or administrative sanctions. They state that a more appropriate definition could therefore include the degree of compliance with tax laws and administration without the actual application of enforcement activity.

James and Alley also discuss tax compliance in terms of tax evasion and avoidance, distinguishing the two in terms of legality.[111] The authors write that 'if taxpayers go to inordinate lengths to reduce

---

[106] B.R. Jackson and V.C. Milliron, "Tax Compliance Research: Findings, Problems and Prospects", (1986) 5 *Journal of Accounting Literature* 125 at 130.

[107] M. Richardson and A.J. Sawyer, above n 105, at 142.

[108] At 142.

[109] JA Roth, JT Sholtz and AD Witte (eds), *Taxpayer Compliance: An Agenda for Research*, (Vol. 1, Philadelphia, University of Pennsylvania Press, 1989a) at 21. For a general discussion of key tax compliance variables, see BR Jackson and VC Milliron, above n 106, at 126 - 146; M Richardson and AJ Sawyer, above n 105, at 145 - 150; and LM Tan and AJ Sawyer, "A Synopsis of Taxpayer Compliance Studies- Overseas Vis-à-Vis New Zealand" (2003) 9:4 *New Zealand Journal of Taxation Law and Policy* 431 at 433 to 437.

[110] S. James and C. Alley, "Tax Compliance, Self-assessment, and Tax Administration in New Zealand – Is the Carrot or the Stick More Appropriate to Encourage Compliance?" (1999) 5 NZJTLP 3.

[111] At 3.

their liability this could hardly be considered 'compliance' either, suggesting such activities as including engaging in artificial transactions to avoid tax, searching out every possible legitimate deduction, and using delay tactics and appeals wherever this might reduce the flow of tax payments'.[112] It is true that some taxpayers are very skilled at delaying the collection of tax through various appeals that can be lodged quite legitimately, such as judicial review.

Even if these activities are within the letter of the law, James and Alley state that they are clearly not within the spirit of the law. They suggest that compliance might therefore, be better defined in terms of complying with the spirit, as well as the letter of the law. This definition would clearly be favoured by revenue officials; however, it is not a view shared by everyone and especially by those who believe there is almost a moral duty to avoid paying tax. James and Alley refer to Lord Clyde in *Ayrshire Pullman Motor Services v CIR*[113]:

> No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores.

James and Alley's final definition of compliance was suggested to be: "the willingness of individuals and other taxable entities to act in accordance with the spirit as well as the letter of tax law and administration, without the application of enforcement activity".[114] James and Alley conclude that to the extent that there is such uncertainty in a tax system, it follows that tax compliance should follow the spirit of the law.

[112] At 9.

[113] *Ayrshire Pullman Motor Services v Commissioner of Inland Revenue* (1929) 14 TC 754 at 763; 8 ATC 531.

[114] S. James and C. Alley, above n 110, at 8.

C The Inland Revenue Compliance Model

[redacted][115]

The Compliance Model used by Inland Revenue is based on a concept developed by regulatory scholars from the Australian National University,[116] as well as on the vast research literature on tax compliance. Responsive regulation is a concept that entails administration of determinate law by officials who tailor their regulatory behaviour according to the compliance posture adopted by individuals subjected to the relevant law.[117] There are five motivational postures that have been identified as being important in the context of taxpayer compliance. These are the deference postures of commitment and capitulation;[118] and the defiance postures of resistance, disengagement and game playing.[119] At an individual level, compliance is not a static, uncomplicated phenomenon.

[115] [redacted]

[116] Australian National University located in Canberra, Australian Capital Territory (ACT), Australia.

[117] Burton, M., "Responsive Regulation and the Uncertainty of Tax Law – Time to Reconsider the Commissioner's Model of Cooperative Compliance?" (2007) 5 *eJournal of Tax Research* 71. The fulcrum of the 'responsive regulation model' of tax administration is the proposition that tax law is determinate, such that 'complying' and 'non-complying' taxpayers may be segregated and treated accordingly. Burton argues that this dichotomous model is problematic in at least some tax contexts, and considers the implications of legal indeterminacy for the cooperative compliance model.

[118] Commitment reflects beliefs about the desirability of tax systems and feelings of moral obligation to act in the interest of the collective and pay one's tax with goodwill. In other words taxpayers are ready, willing and able to comply, are committed to meeting their obligations, have accepted that they have a responsibility to comply, consider there is a moral or ethical obligation to comply, and regulate their own compliance. Capitulation reflects acceptance of the revenue authority as a legitimate authority and the feeling that the revenue authority is a benign power as long as one acts properly and defers to its authority. This posture can relate to the 'try to, but don't always succeed' attitude to compliance as taxpayers in this category do not actively resist the system, often require additional assistance to meet their obligations, try to get things right but often, through a lack of skills or knowledge, inadvertently get things wrong, and acknowledge that, if they cooperate with the revenue authority, the authority will try to assist them as much as they can. Valerie Braithwaite, Friedrich Schneider, Monika Reinhart and Kristina Murphy, "Charting the Shoals of the Cash Economy" in Valerie Braithwaite (ed), *Taxing Democracy*, above n 103, at 93, 97.

[119] Resistance reflects doubts about the intentions of the revenue authority to behave cooperatively and benignly towards those it dominates and provides the rhetoric for calling on taxpayers to be watchful, to fight for their rights, and to curb tax office power. This posture relates to taxpayers that 'don't want to comply' and may hold an attitude that actively resists the self-regulatory system, try to avoid meeting their compliance obligations and believe that the revenue authority is actively pursuing people to 'catch them out' rather than helping them. The least pervasive postures in the community are disengagement and game playing. Both postures are regarded as reflecting a degree of generalised contempt for taxation or as Braithwaite (1995) states disenchantment with goals, not merely processes. Disengagement is the posture that is the least commonly endorsed. Past research in this area would also support the proposition that it appears to be the most difficult for regulators to manage. In contrast game playing demands engagement but not in a way welcomed by authority. Game players remain a small segment of the population, probably because the resources required to use the letter of the law to circumvent the spirit of the law are accessed through relatively elite groups. Valerie Braithwaite, Friedrich Schneider, Monika Reinhart and Kristina Murphy, 'Charting the Shoals of the Cash Economy' in Valerie Braithwaite (ed), *Taxing Democracy*, above n 103, at 93, 97.

McKerchar writes that over the last 30 or so years a considerable body of literature has developed in the area of taxpayer compliance. Despite a great deal of research emanating from a wide variety of disciplines, very little is known about why people do, or do not, pay their taxes.[120] People can move in and out of compliance, often through ignorance and apathy, rather than calculative design. The role of regulators is to keep taxpayers more 'in' than 'out'. The Inland Revenue Compliance Model[121] (see Figure 4) is a tool used to assist in this on-going process.

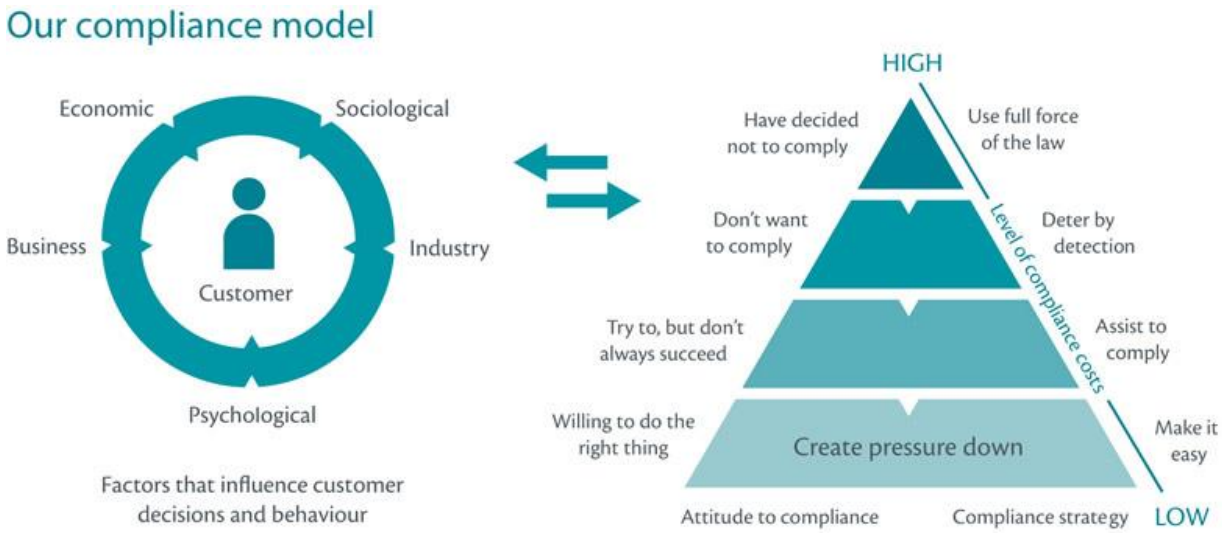


Figure 4: Inland Revenue Compliance Model[122]

A 'cooperative compliance' approach is a more modern way to 'relate' to taxpayers and is regarded generally as the approach adopted by Inland Revenue, where interaction is encouraged at each step of the process (in a dispute or audit interaction) in an attempt to find agreement or consensus and closure within legal parameters. The Compliance Model adopted by Inland Revenue in essence mixes both an economic deterrence model[123] and fiscal psychology model[124] together addressing tax enforcement in a least costly way.

---

[120] Margaret McKerchar, "Why Do Taxpayers Comply? Past Lessons and Future Directions in Developing a Model of Compliance Behaviour" (2001) 16 ATF 99.

[121] The Compliance Model is used by the Australian Taxation Office (ATO) as well as other tax jurisdictions.

[122] The Compliance Model is also referred to as the 'Compliance Triangle' or 'Compliance Pyramid' due to its shape. Source: Inland Revenue Compliance Focus 2013-2013, *www.ird.govt.nz.*

[123] For further reading on the economic deterrence model see: M.G. Allingham and A. Sandmo, "Income Tax Evasion: A Theoretical Analysis" (1972) 1 *Journal of Public Economics* 323; M.J. Graetz, J.F. Reinganum and L.L.Wilde, "The Tax Compliance Game: Toward an Interactive Theory of Law Enforcement" (1986) 2 *Journal of Law, Economics and Organization* 1; S. Scotchmer and J. Slemrod, "Randomness in tax enforcement" (1989) 38 *Journal of Public Economics* 17; J.C. Baldry, "Income Tax Evasion and the Tax Schedule: Some Experimental Results" (1987) 42 *Public Finance/ Finances Publiques* 357. See also McKerchar, above n 120.

[124] For further reading on fiscal psychology models see: Y.D. Song and T.E. Yarbrough, "Tax Ethics and Taxpayer Attitudes: A survey" (1978) 38 *Public Administration Review* 442; A.D.Witte and D.F. Woodbury, "The Effect of Tax Laws and Tax Administration on Tax Compliance" (1985) 38 *National Tax Journal* 1; R. Kidder and C. McEwen, "Taxpaying Behaviour in Social Context: A Tentative Typology of Tax Compliance and Noncompliance" in J. Roth & J. Scholz (eds.) *Taxpayer compliance* (Vol. 2, University of Pennsylvania Press, Philadelphia, 1989);

These definitions all are considering tax compliance from the *position* of the taxpayer, i.e. their filing and other legal obligations. What about the *perspective* of the taxpayer in relation to tax compliance? [redacted] Inland Revenue acting within the 'spirit of the law' would be interlinked with s 6 TAA 1994 with respect to taxpayer perceptions of the integrity of the tax system. There are several instances in this thesis where it may be questionable whether Inland Revenue were acting within the 'spirit' of the law to the best of their abilities.

E. Kirchler, E. Hoelzl and I. Wahl, "Enforced versus voluntary compliance: The "slippery slope" framework" (2008) 29 *Journal of Economic Psychology* 210. See also McKerchar, above n 120.

D The 'Game Player'

[redacted][125]

1 Introduction

[redacted] It is virtually impossible to find unambiguous explanations for human behaviour. As mentioned previously, perhaps the one absolute truth is that people are very complex beings.[126] The game player in a tax context would be no exception. [redacted][127] [redacted]

Braithwaite's[128] theory has a fifth posture that is absent from having its own category in the Compliance Model. This posture is referred to as the 'game player'. A 'game player' can sit anywhere along the Compliance Model continuum and is a subcategory within the four main attitudes. In other words, a customer (taxpayer) can be fully complying but, if the customer's attitude is one of 'winning' against the tax system, then the customer may be considered to be a 'game player'.

The attitudes that represent a 'game player' are customers/taxpayers that enjoy the challenge of 'winning' against the 'tax man', do not necessarily think they are doing the wrong thing, often believe that they are fulfilling their social obligations, often operate within the bounds of the law, and, think they are good citizens. Game players are a unique group in that they can sit anywhere along the left side of the Compliance Model. Braithwaite states that game playing has not been

[125] [redacted]

[126] McKerchar, above n 54, at 11.

[127] [redacted]

[128] Valerie Braithwaite, "Dancing with Tax Authorities: Motivational Postures and Noncompliant Actions" in Valerie Braithwaite (ed.) *Taxing Democracy*, above n 103, at 15, 23.

examined in other regulatory contexts, emerging instead from discussions about posturing with tax officials and taxpayers. A person must have the ability to play the game, and have a masterful knowledge of tax law. [redacted]

2 Game playing - a challenge to authority with a view to winning

[redacted][129]

[130]

[redacted][131]

[132]

[redacted][133]

[134]

---

[129] [redacted]

[130] [redacted]

[131] In broad terms the assets possessed by the taxpayer at the beginning of the period under review is ascertained, the increase in assets (assets less liabilities) in each of the subsequent years is ascertained, and the taxpayer's estimated living expenses and other items of non-deductible expenditure is added.

[132] [redacted]

[133] [redacted]

[134] [redacted]

[redacted]

Ambiguity surrounding what it means to comply with tax law, together with social divisions over the morality of taxation,[135] has allowed the motivational posture of game playing to flourish. This posture is not easily managed by regulators because it focuses on the grey areas of tax law, areas where tax administrators are uncertain and taxpayers see opportunity. Taxpayers who game authorities, find clever ways of complying on strictly technical grounds while visibly thumbing their nose at the spirit of the law, hence, with tax avoidance which is a 'grey' area there is a natural tension between the regulator and regulatee.[136]

In theory, a well-functioning regulatory pyramid would 'nip the game playing posture in the bud', through providing regulators and regulatees with opportunities for deliberation and clarification about what the law means at the pyramid base. Undoubtedly shared understandings of rules come about in other regulatory domains through such dialogic practices. Taxation, however, does not appear to have been so blessed. Braithwaite states that this is not the case with tax systems where legal complexity can befuddle even the most sophisticated players.[137] Tax law is not only complex, but also unclear. The grey areas of law create confusion and uncertainty as well as opportunity for risk takers. Exploiting loopholes and avoiding obligations with some claim to legal protection is not captured in the motivational postures of commitment, capitulation, resistance or disengagement. These relationships lie beyond the bounds imposed by law, authority and expectations of compliance. This relatively new form of defiance tax authorities are grappling with internationally is reflected in a game playing posture. Braithwaite reflects:[138]

> Game playing can be seen in the court room with counsel not just arguing points of law but also challenging the authority of the other party, trying to make the other side look just a little less special, less influential, taking the 'wow' factor out of the opposing counsel. There is a real power struggle that will go on, they are always being deferential to the judge which kind of always fascinates me, the way that lawyers have a wonderful sense of authority and how to manipulate it actually.

---

[135] M.T. Crowe, "The Moral Obligation of Paying Just Taxes" [1944] The Catholic University of America Studies in Sacred Theology, No. 84 as cited in R.W. McGee, "Is Tax Evasion Unethical? (1994) 42 (2) University of Kansas Law Review 411.

[136] In a New Zealand context an example of tax avoidance cases that have complied on strictly technical grounds would include *Ch'elle Properties (NZ) Ltd v Commissioner of Inland Revenue* [2004] 3 NZLR 274 (HC); *Ch'elle Properties (NZ) Ltd v Commissioner of Inland Revenue* [2007] NZCA 256, [2008] 2 NZLR 342 (CA); *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 47; *Accent Management Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19,027 (HC); *Accent Management Ltd v Commissioner of Inland Revenue* [2007] NZCA 230, (2007) 23 NZTC 21,323.

[137] Interview with Valerie Braithwaite, Professor at ANU, (the author, Canberra, 4 December 2008).

[138] Interview with Valerie Braithwaite, above n 137.

In relation to game playing in a court room context Mr Russell is regarded as an able advocate. [redacted][139]

[redacted][140]

Braithwaite[141] states that regulators have caved in to embracing a mind-set that values compliance with the letter of the law, while 'dropping the ball' on maintaining standards of compliance with the spirit of the law.

Braithwaite's comment on 'dropping the ball' by regulators was also confirmed by His Honour Baragwanath J in *Miller v Commissioner of Inland Revenue*[142] In this case, his Honour referred to adhering to both the spirit and letter of the law by officers dealing with the Russell related issues. His Honour referred to an Inland Revenue staff member who had written a minute containing the words "[it] may not be entirely legal but may help stem the flow"[143] referring to an allusion to attempt to deter accountants from involving their clients in the use of the Russell template business structure. His Honour noted that "such an attitude within the system of administering the legislation is troublesome" and that the author of the correspondence had "done a disservice to other officers who adhere to the spirit and letter of the law in performing their difficult task. The temptation to over react against conduct seen as anti-social must be curbed."[144]

Whereas commitment, capitulation and resistance involve acceptance of the authority of the tax authority, game playing, like disengagement, does not. Game playing differs from disengagement in allowing individuals to transcend feelings of alienation and powerlessness. When individuals are in game playing mode they are making an assault on the tax system and they expect to win. Game

[139] [redacted]

[140] [redacted]

[141] Interview with Valerie Braithwaite, above n 137.

[142] *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,001 (HC) at 90.

[143] At 90.

[144] At 90.

playing involves an appreciation of the intricacy of the tax law and delights in finding ways to circumvent its intentions. There is a commitment to the law above and beyond that made by most citizens, but the commitment is to the literal reading of the rule, not to the social goals that the law is meant to serve. Game playing involves a rejection of the citizen role in favour of the individualistic role of a defiant winner. Mr Russell has repeatedly stated that Inland Revenue and the courts should look at the words of the tax statutes, discounting judge made law.

Game playing is not unique to the taxpaying context. It will be found in any situation where playing with the law is rewarding for individuals or groups.[145] In the short term, game playing with authorities may yield positive results through educating and sharpening the skills of those charged with the responsibility of drafting legislation. But the costs are considerable. Once an authority has game playing in its backyard, it cannot allow itself to be too distant or aloof from those being regulated. Intelligence becomes vitally important to both sides as they try to outwit each other. [redacted][146] [redacted][147] [redacted]

Game playing may keep a regulatory authority 'on its toes', but it is also capable of inflicting enormous social damage. It is the very fact that the game is in play, not the winning or losing of the game that threatens the heart of a regulatory authority. Game playing is endless, bearing less and less relation to the problems that the legislature wants resolved, and focusing more and more on the technical details of the rules as they are created and recreated. Reversing or stopping the game is difficult because the game is so exclusionary; to understand 'the play' one must have the technical competence to work outside the traditional institutional square. This is true in respect of the Russell-related litigation as it has spanned over three decades with many issues argued solely on procedural grounds.

Perhaps the greatest harm of game playing is to democracy itself. Game players create a protected and social vacuum for themselves that frees them from responsibility for the broader social consequences. Game playing is morally justified on the grounds of individuals asserting their freedom. Passing the tax burden to those less able to avoid it is tacitly endorsed as an acceptable practice. There are good reasons why game players segment their activities from those of citizenship. Game playing 'jars' with democratic goals and process. As such, game playing threatens the sustainability of the tax system at a fundamental level. [redacted]

[145] Doreen McBarnet, "When Compliance is not the Solution but the Problem: From Changes in Law to Changes in Attitude" in Valerie Braithwaite (ed) *Taxing Democracy*, above n 103, at 229.

[146] [redacted]

[147] [redacted]

[redacted][148]

Braithwaite stated that it was unclear in the early subject discussions for her research whether or not game playing the system was a 'pleasure or a curse' for the taxpayers involved.[149] Mr Russell, for example, has spent a large proportion of his time defending the template as being a valid tax structure. The research by Braithwaite made it apparent that for game players, voicing discontent with the system was unnecessary. Game playing was the posture of those whose sights were set on winning in their interactions with the tax system. The voice of discontent belonged to those who had lost or feared losing the competition.

Multiple postures for a taxpayer can be validly held. Likewise postures can change. Braithwaite states that: [150]

> There is evidence that those that are persistently resistant can go towards being disengaged or game players. They don't start out as being disengaged or game players, but a grievance such as *'they've got a vendetta against me'* may facilitate the change in posture. At some level a taxpayer does care that the tax authority have pursued him in this way, so there's the resistance, there's the component of resistance, but combined with that there's something else, so with those postures of game playing and disengagement there's often big ideological ideals and particular attitudes to that authority and I know what it is in the tax context and that is that it is driven by a desire to win at all costs, now in my more colourful moments I have called it narcissism, because I have sort of hinted at it in my own mind as something that is a bit, you know, a bit off. That was wrong, that was prejudiced. (emphasis added)

Braithwaite has drawn on research that is highly quantitative to confirm the theories of posturing. Most people generally do not think that much about taxation. Responding to revenue authority requests is something that people do not spend time pondering over, they just get on with it and do it, or not, as the case may be. Perhaps the situation is different for Mr Russell as he has devoted about half of his time engaged in tax matters with Inland Revenue in recent years.

All narratives of defiance are social. To justify defiance, a person will compose their narratives so that they are not villains. When a person practices defiance publicly, as has been the case of Mr Russell, they are inventing an identity that is attractive to them and to others; the defiance needs to be couched as strength of character or competent insight; such as standing up for a principle or the ability to foresee a disaster. In the process of self-legitimisation, people draw on shared norms and

[148] [redacted]

[149] Interview with Valerie Braithwaite, above n 137.

[150] Interview with Valerie Braithwaite, above n 137.

values to make their defiance understandable to others, they want 'public acceptability', and 'want to look right'. A fight against injustice is not an uncommon theme among those wishing to excuse or justify defiance and enrol sympathy for their cause.

Mr Russell has stated very vocally that Inland Revenue are running a vendetta against him and has openly stated that he finds fighting Inland Revenue irresistible. When defiant individuals work to establish their credibility in their own and others eyes, authorities work to strip those who are defiant of any justification for their action. Braithwaite writes that there are some institutions that almost everyone 'loves to hate.' Defiance can then come out of the closet, in some contexts even assuming heroic proportions.[151] Such an institution learns to live with defiance in their communities of influence. Such an institution is taxation. In short, resistant defiance in the context of taxation is a cry for attention from the government, whereas dismissive defiance is a call for the state to look the other way, and accept the individual's right to use ingenuity to circumvent tax law.

Although Mr Russell claimed he had not seen the Inland Revenue Taxpayer Compliance Model prior to my first interview in 2010,[152] it is evident that Mr Russell sees himself in a different position on the Compliance Model as opposed to that taken by Inland Revenue. Mr Russell, when questioned as to where he considered he sat on the Compliance Model's attitude continuum, clearly without hesitation stated that he saw himself as 'willing to do the right thing' but considered Inland Revenue staff would have had a separate category for him well above the 'have decided not to comply' category. When discussing the 'pointy' end of the Compliance Model Mr Russell adamantly stated that he would never condone evasive action in the tax environment by any of his clients.[153]

One aspect of the Inland Revenue Compliance Model that became relevant when speaking with Mr Russell was that the Compliance Model fails to capture a taxpayer's view of where they sit on it.

[151] [redacted]

[152] [redacted]

[153] Tax practitioners play an important role in tax compliance. Tax literature shows that they assist the government to enforce the law when it is unambiguous but assist taxpayers to exploit tax law when it is ambiguous. See L M Tan, "Taxpayers' preference for type of advice from tax practitioner: A preliminary examination" (1999) 20 *Journal of Economic Psychology* 431.

The Compliance Model currently assigns a taxpayer with an 'attitude to compliance,'[154] with the appropriate strategy then assigned to the taxpayer. [redacted]

[redacted]

In the author's opinion (after spending many hours with Mr Russell both in interviews and a court setting) Mr Russell does not display narcissistic tendencies, as one may have expected; rather Mr Russell appears to firmly believe in his tax positions taken and viewpoints on the legal merits of tax avoidance. It is important to note that a game player in this context is not necessarily a derogatory term. A game player can sit anywhere along the left hand side of the continuum of the Compliance Model.[155]

Mr Russell's reputation is clearly important to him. This may be why he seeks vindication that his template is justified. [redacted][156] [redacted] Mr Russell was not prepared to let what he saw as an affront to his character pass without a fight.[157]

---

[154] The four attitudes to tax compliance are: 'having decided not to comply'; 'don't want to comply; 'try to, but don't always succeed'; and 'willing to do the right thing'.

[155] The left hand side of the triangular diagram in the Compliance Model.

[156] [redacted]
Interview with Mr John Russell, subject of thesis, (the author, Kawakawa Bay, 29/ 30 April 2010).

[157] Hunt, above n 2, at 73.

There is limited research into the 'game player' in a tax context with reference to a particular person. There is no directly comparable taxpayer in Australia[158] that would claim a vendetta has been run against him over many years like Mr Russell has in New Zealand. Indeed, it is difficult to record the exploits of actual game players in a revenue context. In part this is due to the secrecy laws surrounding taxation and unless reported in the media the 'games' are internally played between the relevant parties.

[158] One person perhaps regarded as an Australian extrovert game player is Mr Peter Clyne, a tax lawyer and financial consultant remembered as the man who took on the Australian Taxation Office (ATO). Mr Clyne was regarded as Australia's first tax 'rebel' with the Australian Taxation Office declaring 'war' on him and seeking to prove that he was evading tax, not simply minimising it. Mr Clyne stated to the Sydney Morning Herald that he had written 19 books, 14 of which were on the subject of tax avoidance, including one titled 'New Adventures in Tax Avoidance'. Chapter 27 of this book explained that one might delay payment of tax by using the appellate courts. The Commissioner of Taxation sent Mr Clyne a tax bill of $1,242,037.58 for income tax payable for the years 1977 to 1980. Mr Clyne said "I indulged my sense of humour in sending in the 58 cents". Mr Clyne also stated "sooner or later, the Commissioner, being immortal, may well get me." Article about Mr Clyne in Sydney Morning Herald, August 3 1982 at 2.

Chapter IV

Tax Avoidance – An Historical Perspective

IV Tax Avoidance – An Historical Perspective

A Background to Tax Avoidance in New Zealand

Tax avoidance is in many ways a legally opaque topic. Avoidance of tax provisions is an outcome of the infinite struggle between the principles of legal certainty on one side and freedom of business activity on the other: between the legal form of the commercial operations and the substance of the aims pursued by taxpayers.[159] The broad language used in s BG 1 ITA 2007,[160] gives this provision an extremely wide theoretical ambit, which could lead to unintended consequences if it was interpreted literally.[161] A natural uncertainty has existed in respect of some tax avoidance concerns but the courts have made it clear in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*[162] that 'the courts should not strive to create greater certainty than Parliament has chosen to provide'.

Paying taxes is almost antediluvian in nature, and likewise tax avoidance. In a New Zealand context the first reported income tax case on the anti-avoidance provision was the *Timaru Herald Company Ltd v Commissioner of Taxes*.[163] The Commissioner lost and did not have recourse to the section again before the courts until the mid-1960s. Until relatively recently avoidance was not such a serious problem from the Commissioner's point of view and he was content to rely on specific provisions designed to cover particular forms of tax avoidance. The upsurge in tax planning dates from the 1950s and was a product of higher tax rates which, with increasing affluence and inflation, were felt by more and more taxpayers as ever increasing reliance was placed on income tax, both as a generator of government revenue and as a means of serving wider and at the same time specific economic and social policies.

The tax burden and the design of the tax system together provided a positive incentive for tax planning, and from the late 1950s, tax advisors set to work with enthusiasm. Faced with tax losses to the revenue, the Commissioner relied on new specific provisions. Within a span of 12 years, from the mid-1960s to the mid-1970s, s 108 Income Tax Act 1954 (ITA 1954) (which later became s 99 ITA 1976, then s BG 1 ITA 1994, 2004 and 2007) was argued four times in the Privy Council (the first being *Newton v Commissioner of Taxation*[164] and in some 50 court cases and Board of Review (forerunner to the TRA) decisions in New Zealand.

---

[159] Marco Greggi, "Avoidance, Evasion and *abus de droit*: an (also linguistic) issue under European tax law", (paper presented to Tax Research Network Conference, Sheffield, 2007) at 1.

[160] The general anti-avoidance provision s BG 1(1) ITA 2007 provides: 'A tax avoidance arrangement is void as against the Commissioner for income tax purposes.' The Goods and Services Tax Act 1985 contains a similar provision contained in s 76.

[161] *New Zealand Taxation: Principles, Cases and Questions* (Thomson Brookers, Wellington, 2012) at 1066.

[162] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 47, at [112].

[163] *Timaru Herald Company Ltd v Commissioner of Taxes* [1938] NZLR 978 (CA).

Tax avoidance is a problem for all modern tax systems. Wherever there are tax laws, it seems that people will find ways of manipulating those rules to reduce their tax liability. In order to combat tax avoidance, many countries have general anti-avoidance rules (GAARs) that allow tax authorities to collect the amount of tax that would have been payable but for the existence of an avoidance arrangement.[165] Section BG 1 is a general anti-avoidance provision. New Zealand has had a general anti-avoidance provision of some form in its tax legislation since 1891.[166] Tiley regards the general anti-avoidance rule (GAAR) as a confession of failure.[167] Tiley further states that 'more specifically, it was difficult to see how a GAAR could deal with avoidance structured around specific rules and definitions.'[168] This really is at the heart of the Russell template transactions, the actual words of the statute itself, tensioned with the spirit of the statute. Tiley continues, saying that "some see a GAAR as a way of shortening the statute book."[169]

Whether a GAAR exists or not in a tax jurisdiction, tax avoidance is dealt with by the tools available to the revenue authority. The Income Tax Act 2007 (ITA 2007) tax avoidance provision BG 1 (1) states that 'a tax avoidance arrangement is void as against the Commissioner for income tax purposes.' Part G ITA 2007 allows for reconstruction[170] where the Commissioner may counteract a tax advantage that a person has obtained from or under a tax avoidance arrangement.

Before voiding a tax avoidance arrangement two questions must be considered; firstly how is 'tax avoidance' defined, and secondly what is a 'tax avoidance arrangement'?

The definition of 'tax avoidance' and 'tax avoidance arrangement' both feature in this thesis when considering the 'Track' litigation, especially 'Track E' where Mr Russell has claimed he personally received no tax advantage from the transactions considered.

---

164 *Newton v Federal Commissioner of Taxation* [1958] AC 450 (PC).

165 R. Prebble, "*Tax Avoidance, Common Law & Civil Law: Comparative Approach*" (2005-2006) 2 IJOTALFIPA 1.

166 Section 40 of the Land and Income Tax Assessment Act 1891 provided that any covenant or agreement that purported to alter the nature of an estate or interest in land for the purpose of defeating the payment of tax was void and of no effect. Section 40 of the Land and Income Tax Assessment Act 1891 was based on s 62 of the Land Tax Act 1878, and was designed to prevent land owners from shifting the burden of tax onto their tenants. Accordingly, s 40 was based on a transaction tax and was 'exported' into the first Income Tax Act, yet was an entirely different form of tax.

167 J. Tiley, "Managing Tax Avoidance: Recent UK experience", (Annual Lecture, Melbourne, August 2007).

168 At 1.

169 At 1.

170 GA 1 (2) The Commissioner may adjust the taxable income of a person affected by an arrangement in a way the Commissioner thinks appropriate, in order to counteract a tax advantage obtained by the person from or under the

The legislative definition of tax avoidance is as follows:[171]

> tax avoidance includes –
> (a) directly or indirectly altering the incidence of any income tax:
> (b) directly or indirectly relieving a person from liability to pay income tax or from a potential or prospective liability to future income tax:
> (c) directly or indirectly avoiding, postponing, or reducing any liability to income tax or any potential or prospective liability to future income tax

This definition has been regarded as 'deeply flawed' and that the flaws are indicative of the elusive nature of the idea of tax avoidance and the consequent difficulty of legislating against it.[172] A 'tax avoidance arrangement'[173] means:

> 'an arrangement, whether entered into by the person affected by the arrangement or by another person, that directly or indirectly –
> (a) has tax avoidance as its purpose or effect; or
> (b) has tax avoidance as 1 of its purposes or effects, whether or not any other purpose or effect is referable to ordinary business or family dealings, if the tax avoidance purpose or effect is not merely incidental.'

Richardson J in *BNZ Investments Ltd*[174] summarised the three key elements of s BG 1 ITA 1994 (now ITA 2007) at 17,115:

> Line drawing represents the legislature's balancing of the relevant public interest considerations. In terms of [s BG 1], that line drawing is directed to three elements, each of which contains its own limits. There must be an arrangement coming within the section. The arrangement must have a more than merely incidental purpose or effect of tax avoidance. And where those two ingredients are present, the assessable income of any person affected by the arrangement is adjusted so as to counteract any tax advantage obtained by that person from or under that arrangement.

This thesis will indicate how difficult the 'line drawing' can be, both in a legislative sense, as well as a practical sense. The 'Track A' litigation attributed profit to companies stripped bare, so the advantage was assigned to the original company shareholders. Income was attributed to Mr Russell personally as also being a person affected by an arrangement, although he claimed he had not

---

arrangement. See also GA 1 (3), (4), (5), (6). For all other purposes, an arrangement that is set aside for tax purposes is still valid between the parties to the transaction and any third party who is affected by it.

[171] Section YA 1 ITA 2007.

[172] Sandra Eden and Judith Freedman, "Editorial: Special Issue on Overseas Judicial Anti-avoidance Developments" [2009] BTR 159 at 170.

[173] Section YA 1 ITA 2007.

[174] *Commissioner of Inland Revenue v BNZ Investments Ltd* [2002] 1 NZLR 450 (CA); (2001) 20 NZTC 17,103 (CA).

personally benefited from the arrangement. Regardless of how tax avoidance is addressed in a jurisdiction, whether with a GAAR or without, it remains a heavily litigated area.[175]

A number of New Zealand tax cases have been heard by the Privy Council (on appeal from the Court of Appeal).[176] Their Lordships have in several instances overturned the New Zealand Court of Appeal decisions, including *Commissioner of Inland Revenue v Challenge Corporation Ltd*[177] *(Challenge)*. *Challenge* was the first New Zealand tax case that involved an arrangement that deliberately sought to take advantage of two specific provisions in the ITA 1976, which governed the carry forward and offsetting of tax losses between groups of companies. Previous cases essentially involved family arrangements and the general core provisions in the ITA 1976, which governed the calculation of allowable deductions and assessable income.[178]

[175] Tiley, above n 167, at 14.

[176] The Privy Council was described by Thomas J in a dissenting judgment at [70] in *Commissioner of Inland Revenue v BNZ Investments Ltd*, above n 174 as providing a 'fecund breeding ground' for dubious schemes to avoid tax, stating that the glosses, concepts, distinctions and doctrines had been exploited and had created a commercial environment in New Zealand in which tax avoidance had become a significant feature. He considered the Privy Council had inhibited the Courts in examining the substance of a transaction. *Peterson v Commissioner of Inland Revenue* [2005] UKPC 5, [2006] 3 NZLR 433 (PC) was a 3:2 majority decision in favour of the taxpayers. This demonstrates the difficulty for the Court with addressing tax avoidance cases. Often the judgment is not unanimous.

[177] *Challenge Corporation Ltd v Commissioner of Inland Revenue*, above n 49.

[178] D. Dunbar, "Judicial Techniques for Controlling the New Zealand General Anti-Avoidance Rule: The Scheme and Purpose Approach, from *Challenge* to *Peterson*" (2006) 12 NZJTLP 324 at 343.

B The Challenge *Case*

> *"But what can be seen is that in this most difficult area of tax law, what is and what is not acceptable to Inland Revenue can change over time."*[179]

In an oblique way Mr Russell was connected to the *Challenge* tax avoidance litigation. This case has its own place in New Zealand tax jurisprudence, as it was one of the first cases where tax avoidance was analysed by New Zealand courts and subsequently by the Privy Council. The Court of Appeal finding for the taxpayer, the Privy Council overturning that decision with a judgment[180] that has been regarded as a 'gut response' by the Law Lords.[181]

Mr Russell's connection to the *Challenge* case is that he had registered and set up a company called Merbank Corporation Ltd (Merbank), the company at the heart of the *Challenge* transaction. Merbank was a member of the Securitibank group. The Securitibank group was in liquidation with the liquidator seeking advice from a tax advisor[182] to the group about the possibility of finding a buyer for a company with large tax losses,[183] considering it may be attractive to a prospective purchaser.[184] After approaching a number of major public companies without success, eventually interest in a purchase was kindled with Challenge Corporation.

---

[179] Brendan Brown, "The moving goalposts of tax avoidance" (24 February 2012) *New Zealand Lawyer* 15.

[180] *Commissioner of Inland Revenue v Challenge Corporation Ltd*, above n 24.

[181] The *Challenge* Privy Council decision was a 4:1 judgment. The majority judgment was a 'pure gut' response. There was very little detailed analysis, and the court paid little attention to the grounds and analysis in the decisions in favour of the taxpayer at the High Court and Court of Appeal. All cases referred to were United Kingdom cases. There was no discussion of the New Zealand cases including previous Privy Council decisions on the predecessor to s 99 ITA 1976.

[182] Mr Wilson of Barr, Burgess and Stewart.

[183] Challenge Corporation Ltd knew the group of companies it owned would achieve a substantial profit for the income year about to end on 31 March 1978. Securitibank had collapsed spectacularly in 1976 and in 1977 Mr William Wilson, a chartered accountant and at the time a partner in the firm Barr, Burgess and Stewart, was acting as a tax advisor to the then liquidator of the Securitibank group. The liquidator advised Mr Wilson that one of the companies involved in the Securitibank collapse, Kelmac Property Consultants Ltd (Kelmac), had incurred a substantial loss for the year ending 31 March 1978. Mr Wilson was asked to investigate whether the shares in Kelmac might attract a buyer on the basis that, although Kelmac was insolvent, its large tax loss might be an attraction to a purchaser.

[184] Mr Wilson readily acknowledged in evidence in the High Court that Kelmac Property Consultants Ltd (Kelmac) had enjoyed no previous association with Challenge and that Kelmac was dormant at the date of the transaction. Utilising tax losses in this manner and the correspondence showing approval from Inland Revenue supports the proposition that this practice of loss utilisation was commonplace at this time in New Zealand.


MERBANK CORPORATION LTD

77816

This is to certify that MERBANK CORPORATION LTD was incorporated under the Companies Act 1955 as a Private Company (Shares) on the 3rd day of November 1969
and was removed from the register on the 15th day of February 1995.

The principal difficulties foreseen by the tax advisor to the then liquidator of the Securitibank group was in the negotiations related to ss 188 and 191 of the Income Tax Act 1976 (ITA 1976), the legislation in force at the time. Mr Wilson, the tax advisor, wrote to Inland Revenue expressing concerns over the transaction but received a reply giving comfort to the transaction that the tax losses would be available for carrying forward for tax purposes.[185] However, there was perhaps a change brewing in the tax avoidance 'environment' as to what was acceptable in tax planning and what was not.

[redacted] This may have led to the deeper investigation and ultimate court challenge by Inland Revenue as there was clearly a change in the tacit acceptance previously enjoyed by companies selling tax losses.

The 'mechanics' of the *Challenge* transaction was relatively simple, especially in comparison to some of the complications apparent in more recent tax avoidance structuring. Challenge Corporation[187] purchased all the capital of a loss company known as Perth Property

[185] Mr Wilson wrote to the District Commissioner of Taxes in Auckland on 28 November 1977, setting out the basis of the proposed transaction and seeking his comments. Kelmac Property Consultants Ltd (Kelmac) had sold a property, the Knox Plaza, located in Wellington and had sustained a loss in the order of $5 million which Mr Wilson sought to have regarded as an income loss and not a capital loss for reasons advanced in his letter to the District Commissioner. The proposal was that, before 31 March 1978, Kelmac would increase its share capital by $5 million, Merbank Corporation Ltd (a Securitibank subsidiary and a shareholder of Kelmac) would subscribe for the new capital and pay the call, whereupon Kelmac would repay its liability to Merbank of $4,962,759 and would pay certain other creditors. Merbank would then have, as an asset, the shares in Kelmac. The loss that would have been available to Merbank as a bad debt became available to the purchaser of the Kelmac shares. In a letter dated 3 March 1978, the senior examiner of Inland Revenue at Lower Hutt, Mr Paganini, advised Mr Wilson that the loss on the Knox Plaza would be treated by Inland Revenue as deductible and that, if matters eventuated as described in Mr Wilson's letter, the loss would be available to his client for carrying forward for tax purposes.

[186] [redacted]

[187] Challenge Corporation Ltd had its origins in the rural sector with Levin and Co., a drapery business which was founded in Wellington in 1841. This company grew and spread to service rural communities as a stock and station agency. The stock and station agents coordinated buying and selling, exporting grain and other produce and importing commodities not manufactured in New Zealand. Fletcher Challenge Ltd was formed in January 1981 when two of New Zealand's largest companies – Fletcher Holdings Ltd and Challenge Corporation Ltd merged with

Developments Ltd (Perth).[188] It was apparent there was no commercial justification for the transaction primarily because at the time of the transaction Perth was a dormant company that was not trading, and after the sale Perth did not engage in any form of business activity. It was never envisaged that Perth would undertake any activity within the Challenge group of companies. In addition to the dormant state of Perth, it owned no valuable assets of any kind, apart from the available tax losses.

The company tax rate at the time was 45 cents in the dollar and Challenge were to pay on settlement, after the income tax position was finalised, an amount equivalent to 22.5 per cent of the tax loss available to be deducted from the assessable income of Challenge Corporation Ltd, less $10,000 already paid. Challenge was also to pay interest to the extent that any deferral of tax benefited Challenge Corporation. [redacted][189] [redacted]

[redacted][190]

In the High Court[191] Barker J found for Challenge Corporation Ltd. Inland Revenue proceeded to the Court of Appeal and a 2:1 judgment again found for the taxpayer.[192] The Privy Council in a 4:1 decision[193] overturned the Court of Appeal decision essentially stating that apart from the risk of losing $10,000 the Challenge group never risked anything, never lost anything, and never spent

---

Tasman Pulp and Paper Company Ltd, a company which they controlled jointly. (Fletcher Challenge Archives, *http://www.fclarchives.co.nz/companies.php* (Accessed on 31/3/2010).

188 The agreement between Challenge Corporation Ltd and the liquidator of Merbank was recorded in a document dated 28 February 1978. Merbank sold its shares in Kelmac to Challenge Corporation Ltd. Kelmac's name at this time had been changed to Perth Property Developments Ltd. The agreement recited, inter alia, that Perth was indebted to Merbank in the sum of $5,804,040 and that share capital of Perth was to be increased by this amount by means of the issue of $5,804,040 fully paid shares to Merbank in satisfaction in the equivalent amount of Perth's liability to Merbank. Merbank would also procure from a minority shareholder shares not owned by it, and on-sell them to Challenge. A similar transaction was entered into affecting all the shares of another Securitibank company, Security Real Estate Ltd. Security Real Estate Ltd was in liquidation but had incurred the lesser income loss for the year of $484,319.00. In the ordinary or conventional sense neither company had any commercial value at the time of the transaction, nor did they have any prior association with Challenge Corporation Ltd.

189 [redacted]

190 [redacted]

191 *Challenge Corporation Ltd v Commissioner of Inland Revenue*, above n 49.

192 *Commissioner of Inland Revenue v Challenge Corporation Ltd*, above n 49. The Court consisted of Woodhouse P. (dissenting), Cooke and Richardson JJ.

193 *Commissioner of Inland Revenue v Challenge Corporation Ltd*, above n 24.

anything but were claiming to deduct a loss of $5.8 million. Challenge had not practised tax mitigation because the Challenge group had never suffered the loss of $5.8 million which would entitle them to a reduction in their tax liability of $2.58 million.

The financial executive director of Challenge Corporation at the time, Mr Ian Small, stated that 'any company acquired for the purposes of utilising tax losses had to be 'clean'[194] at the date of the transaction. This comment also would indicate that the utilising of tax losses in this manner and the correspondence showing approval from Inland Revenue for this type of transaction supports the notion that the loss selling was commonplace and accepted practice at the time. Mr Russell commented that Inland Revenue had been approving this type of transaction for many years prior to the *Challenge* transaction being 'challenged'.

The *Challenge* decision led to the Commissioner publishing a Practice Statement (CPS) on s 99 ITA 1976 on 8 February 1990.[195] There was also subsequent legislative amendment to overturn the *Challenge* method of loss usage.

[redacted]

[194] 'Clean' at the date of the transaction referring to no outstanding liabilities.

[195] The Commissioner's Policy Statement (CPS) addresses the interaction between specific tax provisions and the general anti-avoidance provision, s 99 ITA 1976 [now s BG 1 ITA 2007].

C Carrying Forward Tax Losses – A New Zealand Historical Overview

The ability of a taxpayer to carry forward losses first arose under the Land and Income Tax Amendment Act 1922. Losses could only be allowed to be carried forward for business income for a period of three years. In 1936, a continuity of shareholding was required with reference to the last day of the income year. A limitation of business profits was removed in 1945 and in 1953 a three fourths continuity requirement was changed to two thirds. In 1968, losses were allowed to be offset without time limit. In 1971, the shareholding continuity test was changed to 40 per cent. Section 188 [Losses incurred may be set off against future profits] ITA 1976 was in this state at the time of the *Challenge* arrangement. Section 191 [Companies included in Group of Companies] ITA 1976 provided one of the few examples in the ITA where the strict rule of separate corporate personality did not apply.

New Zealand's companies' legislation clearly supports that a company is a separate person independent of its shareholders.[196] Section 15 of the Companies Act 1993, and its predecessor section in the Companies Act 1955, entrenched the principle laid down by the House of Lords in *Salomon v Salomon & Co Ltd*.[197] This case established the 'veil of incorporation' and this was reaffirmed in New Zealand law by the case *Lee v Lee's Air Farming Ltd.*[198] Although the *Salomon v Salomon & Co Ltd* principle applies in New Zealand in a corporate context, the Commissioner of Inland Revenue is not constrained by the rule, the taxing statutes empower the Commissioner to make an adjustment if warranted. Section 99(2) and (3) of the ITA 1976 required the Commissioner to counteract any tax advantage. Subsection (3) read '…the assessable income of *any* person affected by that arrangement shall be adjusted in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained….' (emphasis added). Inland Revenue can pierce the corporate veil for taxing purposes in certain circumstances.[199]

[196] Companies Act 1993 section 15 [Separate Legal Personality] states that a company is a legal entity in its own right separate from its shareholders and continues in existence until it is removed from the New Zealand Register. Refer also to s 27(3) Companies Act 1955 (now repealed).

[197] *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL). Salomon was a shoe manufacturer who formed a private company, sold his business to the company and was the managing director. The company was ultimately placed into liquidation. The creditors argued that Salomon and Salomon & Co Ltd were in reality one and the same, bearing in mind the specific circumstances leading up to the company incorporation. The House of Lords stated that Salomon & Co Ltd was an entity, a person separate from Salomon himself, despite his domination of it, and that the company's debts were not Salomon's debts personally. (Andrew Beck and Andrew Borrowdale, *Guidebook to New Zealand Companies and Securities Law*, (6th ed, CCH New Zealand Ltd, Auckland, 1998) at section 102.

[198] *Lee v Lee's Air Farming Ltd* [1961] NZLR 325 (PC).

[199] The legislative purpose of section HK11 (or its equivalent provision) was first enacted in 1937 to stop gold mining companies from distributing all of their capital via dividends before they were assessed for income tax. The speech of the Minister of Finance in 1991 amending section 276 of the ITA 1976 made reference to asset stripping and depletion. This is supported by the decision of the High Court in *Spencer v Commissioner of Inland Revenue* (2004) 21 NZTC 18,818 (HC) which had also made a reference to depletion of assets. There must be an arrangement that results in the company being unable to pay its tax. There must be something about that arrangement which produces that result. That "something" must involve the depletion of assets. The stripping or depletion of assets must be to the benefit of the director who could be assessed under section HK11. Section HK11 is not a general recovery provision. The current ITA 2007 section is HD15 [Asset stripping of companies].

The concept of grouping companies for tax loss purposes was introduced in 1968. Losses incurred by one of a number of companies in a group for an income year in question may be grouped. [200] It is important to note, however that an amendment to the law in 1980, which had no application in the *Challenge* case, required that the continuity of shareholding requirement exist for the whole period from beginning of the year to the end of the year to which it is claimed to carry that loss forward.[201]

The Commissioner could apportion losses to part of the year where the shareholding requirement was met for part of the year.[202] A new s 191(8) was enacted in 1980. This was an anti-avoidance provision extending the operation of the existing provisions to arrangements covering any shares in a loss company or any other company. At the same time a grouping deduction was not permitted unless the companies involved were included in some group of companies for the income year for which the loss or part of the loss was incurred. The loss offsets in the *Challenge* case, where the profits being offset were from the 1978 income year, could not have been made if the 1980 amendment had been in force at the time. Section 188 and 191 were complex, but essentially offered relief from the general principle that liability to tax is calculated annually for each individual taxpayer.

[200] Where two or more companies have common voting and market value interests that are at least 66 per cent they may be treated as a group for tax purposes (s IC 3 ITA 2007). The common grouping of at least 66 per cent by these companies allows a loss offset between companies in the group in the same year (s IC 1 ITA 2007). This is achieved by way of subvention payment or by election.

[201] As enacted in 1968, s 141 ITA 1954 required that the prescribed proportions of paid up capital, nominal value and allotted shares of voting power be held at any time during the income year in question. In 1969 the section was altered so that the requirement had to be met at and only at the end of the income year in respect of which grouping was being sought. An anti-avoidance provision was also introduced at that time. From 1969 onwards and at the material time of the *Challenge* transaction the test of common shareholdings, voting power or entitlement to profits was satisfied on a particular day – at the end of the income year.

[202] Under the ITA 2007, a company can only carry forward a tax loss component of a loss balance if at all times during the period from the beginning of the year of loss to the end of the year of carry forward (the continuity period) a group of persons holds an aggregate of at least 49 per cent of the minimum voting interest in the company. When shareholder continuity has been breached part way through an income year, any net loss incurred by the company which is attributable to the part period of the year after the change in shareholding is a loss balance that can be carried forward by the company (assuming the 49 per cent continuity requirement is satisfied from the date of ownership change until the end of the carry forward year).

D Context of the 1980s

1 New Zealand

There has been a changing environment faced by tax administrators over the last few decades. The template transactions were promoted between 1980 and 1986, with the tax effect continuing for many years after. It is important to make a comment, albeit brief about the context of the 1980s. There has been significant litigation since the introduction of the template, as well as the introduction of the new penalties regime with the penalty of abusive tax position introduced in 1997.[203] The continuing problem of tax avoidance was acknowledged by [redacted][204] [redacted] [redacted][205]

[redacted] The era of over full employment post World War II and the growing economy perhaps lent credence to the prospect that tax avoidance was simply a minor aspect of the tax environment in New Zealand. The comments above in respect of tax loss sales being commonplace support this notion.

The High Court decision[206] in *Challenge* found that the purpose of the agreement was to reduce the liability to income tax of the Challenge group of companies to the extent that its effect would enable the tax loss of Perth to be deducted from the Challenge group's assessable income. Perth gave notice of an election under s 191 ITA 1976 transferring its losses to the Challenge group of companies. The Commissioner contended that the arrangement was void against the Commissioner under s 99. The taxpayer contended that notwithstanding s 99, it was entitled to treat the agreement as valid against the Commissioner because s 191(5) allowed losses to be transferred in certain circumstances between members of a group of companies. The High Court agreed with the taxpayer that s 99 cannot apply in circumstances where comprehensive provisions in the statute itself cover

[203] The Compliance and Penalties Regime in the TAA 1994 came into effect on 1 April 1997.

[204] [redacted]

[205] [redacted]

[206] *Challenge Corporation Ltd v Commissioner of Inland Revenue*, above n 49.

the particular topic, such as tax losses and grouping, and where the taxpayer complies with such provisions, which include anti-avoidance provisions. Mr Russell repeatedly maintains that he has also complied with statute law.[207] In *Challenge* the Court of Appeal agreed with the lower court. Ultimately, as discussed above, the Privy Council begged to differ. The tide was beginning to turn on previous tax avoidance acceptance.

The mid-1980s also saw the emergence of the transaction at the centre of the 'Winebox'[208] Inquiry, although the 'Winebox' documents themselves were not tabled in Parliament until 1994. The 'Winebox' documents evidenced methods of business involving dealings in promissory notes. In the Magnum Corporation Ltd ('Magnum') transaction, one member of the European Pacific group paid tax of $881,582 on behalf of another member. Contemporaneously another member issued and sold to the Cook Island Property Corporation a promissory note (for $10,000,000 plus interest) for the consideration of $10,881,582. Contemporaneously yet another member of the group bought the same note from the Cook Island Property Corporation for $10,050,000. The Cook Islands government issued a tax credit for $881,582 which was utilised against New Zealand income tax. All of this was prearranged. In the result all of the tax paid was in substance repaid but the Cook Island Property Corporation made on behalf of the Cook Islands government a profit of $50,000. The arrangements were evidently not disclosed to the New Zealand Commissioner of Inland Revenue.[209]

[207] In *Miller v Commissioner of Inland Revenue*, above n 142, at 61-62, the plaintiffs advanced the argument that s 191(in the amended form enacted in 1980 following the *Challenge* decision) [redacted] provided a code distinct from s 99 [redacted] The plaintiffs emphasized in particular that the new subsection (7C) (to be read with (7(D)) gave the Commissioner a limited anti-avoidance power in the context of the grouping of accounts. His Honour Baragwanath J in *Miller* did not read the amended legislation as having any effect on the Commissioner's success in *Commissioner of Inland Revenue v Challenge Corporation Ltd*, above n 24.

[208] Winston Peters brought the documents at the centre of the allegations to Parliament in a wine box. The Winebox Inquiry was an inquiry undertaken to investigate claims of corruption and incompetence in the Serious Fraud Office (SFO) and Inland Revenue. The full name of the Inquiry was the Commission of Inquiry into Certain Matters relating to Taxation. It became popularly known as the Winebox Inquiry.

[209] For more on the 'Winebox' see *Controller and Auditor-General v Davison* [1996] 2 NZLR 278; [1996] NZAR 145 and *Brannigan v Davison* [1996] 2 NZLR 278; [1996] 2 NZLR 338; [1996] NZAR 145 (CA).

2 Australia

In the late 1970s and early 1980s there was an unprecedented challenge to the integrity of the Australian tax system. Mass marketed tax avoidance and evasion schemes were aptly described as 'blatant, artificial and contrived'.[210] The tax schemes 'era' began in Australia in the early 1970s. After a slow beginning, schemes took off in 1976. By 1982 promotion of the last of them had stopped.

A name that had become a household name was that of a stockbroker, Mr Charles Curran who got the High Court of Australia[211] to agree that, for tax purposes, bonus shares had a cost equal to their face value. Curran had developed a dividend-stripping scheme that was so widely copied that Curran became a household name. The case was heard in 1974 with the transactions taking place in 1969. On 8th February 1989[212] the High Court in Canberra took the unusual step of overruling the previous High Court decision, which had paved the way for many of the tax avoidance schemes that operated during the 1970s. By applying a strict legal interpretation of the Income Tax Assessment Act 1936 to the Curran scheme, the Barwick Court in 1974 gave a green light to many of the tax avoidance schemes in the late 1970s, including the infamous bottom-of-the-harbour schemes.[213] The Court found the reasoning in the previous High Court decision to be defective, arguing that account had to be taken of the diminution in value of the original shares caused by using the large dividends to create new bonus shares. Five of the six judges said that by not taking into account the loss in value a false picture was being created.

Many tax avoidance decisions are not unanimous, which clearly demonstrates the difficulty the courts have in relation to the topic of tax avoidance.[214] Further, it is not uncommon for a higher

---

[210] Income Tax Assessment Bill 1978, 7 April 1978, Second reading speech as end-noted in T.P.W. Boucher, *Blatant, artificial and contrived: tax schemes of the 70s and 80s* (1st ed, Australian Taxation Office, 2010).

[211] *Curran v Federal Commissioner of Taxation* (1974) 131 C.L.R. 409 (HCA). The High Court bench composed of Chief Justice Barwick and Justices Menzies, Gibbs and Stephens.

[212] In *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 the majority took the view that the precedent decision that they were invited to overrule (the Curran decision) was what might be called an outlier, sharing no basis in principle with other cases that, at first glance, might have appeared similar to it. For further reading see M. Harding and I. Malkin, "Overruling in the High Court of Australia in Common Law Cases" (2010) 34 MULR 519. Also see "High Court changes tax avoidance ruling", *The Sydney Morning Herald*, (Sydney, February 9, 1989).

[213] Essentially a company would be stripped of its assets and accumulated profits before its tax fell due, leaving it unable to pay. Once assets were stripped the company would be sent, in a metaphorical sense, to the 'bottom of the harbour' by being transferred to someone of limited means and with little interest in its past activities. The company's records were also often lost. The Australian Taxation Office, being in the same position as other unsecured creditors in the case of an insolvent company, would end up with nothing. In 1980 the Crimes (Taxation Offences) Act 1980 (Cth) made it a criminal offence for any person to make a company or trust unable to pay tax debts, or to aid or abet any person or company doing so.

[214] By way of example the *Commissioner of Inland Revenue v Challenge Corporation Ltd*, above n 24 was a 4:1 decision; *Commissioner of Inland Revenue v BNZ Investments Ltd*, above n 174 was a 4:1 majority decision; *Peterson v Commissioner of Inland Revenue*, above n 176 was 3:2 decision.

court to overturn a lower court decision in the area of tax avoidance. This was the environment at the birth of the template created by Mr Russell. The Barwick Court applying a strict legal interpretation to the Income Tax Assessment Act 1936, essentially giving a 'green light' to tax avoidance schemes [redacted]

3 United Kingdom

In the United Kingdom over the last 75 years there has also been an attitudinal shift by the courts as to what constitutes tax avoidance. The often quoted *Duke of Westminster* case[215] shows the early twentieth century focus by the courts to adopt a strict interpretation of taxation laws, essentially by way of the proposition that taxpayers have the right to arrange their affairs in such a way so as to pay the least amount of tax. Until the early 1980s the *Duke of Westminster*[216] case was precedent and the United Kingdom Inland Revenue[217] was rarely successful in challenging tax avoidance schemes in the courts.

In 1981, the House of Lords took a completely different view of an avoidance scheme. In *W T Ramsay Ltd v IRC*[218] an artificial scheme was used to create a large capital loss. The company had realised a capital gain and intended to set the artificially generated loss against the capital gain to avoid paying tax on the gain. The scheme was artificial because it was made up of a series of preordained steps which were to be carried out in rapid succession. The scheme required that all steps be completed once the first one had been made. At the end of the series of steps the taxpayers would be in the same position as they had been at the beginning and any loss created would not be a real financial loss, just a loss on paper. The only real losses which had been suffered were the professional fees which were paid for the scheme's operation.

The House of Lords decided that although each step in the scheme was a separate legal transaction, it was possible to view the scheme not as a series of separate legal transactions, but as a whole, by

[215] *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1 (HL).

[216] In this case servants were not paid wages but instead received an income from a deed of covenant. A deed of covenant produces a tax deductible amount for the person extending the deed and is valid only if no valuable consideration is provided by the recipient in return. However, the Duke of Westminster and his servants had an understanding, that so long as the deed of covenant operated the servants would not claim the wages due to them. The scheme enabled the Duke to claim tax relief for the amounts paid to his servants whereas payment of wages to servants would not have been an allowable deduction from income tax. Today such a scheme could not be used because payments made under deeds of covenant are no longer tax effective when paid to individuals. However, at the time, the House of Lords found for the Duke, declaring that they would only consider the legal nature of the transaction. (Andrew Lymer and Lynne Oats, *Taxation: Policy and Practice* (14th ed, Fiscal Publications, Birmingham, 2008) at 397.

[217] A new department was formed on 18 April 2005 when Inland Revenue merged with HM Customs and Excise to form Her Majesty's Revenue and Customs (HMRC).

[218] *W T Ramsay Ltd v Inland Revenue Commissioners* [1981] STC 174 (HL).

comparing the position of the taxpayer in real terms at the start and finish of the scheme.[219] When this was done no real loss was incurred and the scheme was self-cancelling.[220]

The so-called *Ramsay principle* was extended in *Furness v Dawson*[221] where the House of Lords decided that a scheme that was not circular or self-cancelling should still be set aside for tax purposes as the scheme required a series of artificial steps to be carried out in quick succession just to save tax rather than with a real business purpose in mind.[222] Towards the end of the 1980s the *Ramsay principle* was limited by the House of Lords in *Craven v White*[223] where the House of Lords refused to view a series of transactions as a whole and this particular scheme was successful in reducing tax liability.[224]

Caution must be taken when comparing different tax jurisdictions where, although tax avoidance has similar traits, the 'toolbox' to address the avoidance issue may be of a different construction.[225] The United Kingdom has no general anti-avoidance rule (GAAR) as is present in the Australian, Canadian and New Zealand legislation.[226] Her Majesty's Revenue and Customs (HMRC) in the United Kingdom deal with tax avoidance by way of specific legislation to specific transactions and more recently, manage their tax risk by way of requiring disclosure of tax avoidance schemes by promoters.[227]

---

[219] Lord Wilberforce explained the decision by stating: "While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax, or a tax consequence, and if that emerges from a series, or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."

[220] Lymer and Oats, above n 216, at 398.

[221] *Furness (Inspector of Taxes) v Dawson* [1984] AC 474 (HL).

[222] The objective was to defer capital gains tax by using an intermediary company based in the Isle of Man.

[223] *Craven v White* [1989] AC 398 (HL).

[224] Similar to *Furness v Dawson* an intermediary company in the Isle of Man was used to defer a capital gains tax liability. The key difference between *Craven v White* and *Furness v Dawson* was that when the shares were transferred to the Isle of Man based company; their final disposal had not been agreed. Hence no preordained series of steps existed at the time that the first transaction was undertaken. *Craven v White* had significance in the United Kingdom for tax avoidance schemes generally as it addresses the planning aspect of tax avoidance schemes. If transactions are undertaken before a final step is known with certainty there is a greater likelihood of the scheme being successful if challenged by HMRC as a tax avoidance activity.

[225] For a robust discussion on recent judicial anti-avoidance developments see Eden and Freedman, above n 172.

[226] A G Hodson, *'Sticks and Stones' – The Social Cost of New Zealand's First Two Supreme Court Tax Avoidance Decisions: Is a Scheme Disclosure Provision the Way Forward for New Zealand?*, (Working paper presented at the Tax Research Network Conference (TRN), Cardiff University, September 2009).

[227] There is no general anti-avoidance provision in the United Kingdom tax legislation. Rather, the approach to tax avoidance has been to deal with specific transactions by specific legislation introduced to curtail new schemes. The UK introduced scheme disclosure provisions in the Finance Act 2004 to manage the risk of tax avoidance, evasion and fraud. These provisions require those who market tax avoidance schemes and those that use them to make disclosures to HMRC. Initially in 2004 when first enacted the disclosure provisions covered certain financial and

[redacted]

[redacted][228] [redacted]

[redacted]

[redacted][229]

employment products. In 2006 the provisions were extended to the whole of Income Tax, Corporations Tax and Capital Gains Tax. It now also covers National Insurance Contributions (since 2007), Stamp Duty Land Tax (further extended in 2010 and 2012) and Inheritance Tax (effective from 2011). HMRC provide guidance for the disclosure of tax avoidance schemes on their website, see HM Revenue and Customs (UK), *www.hmrc.gov.uk* (Accessed on 10/12/2012).

[228] Rossminster was a private bank that had funded many sophisticated tax avoidance schemes. For further reading see Nigel Tutt, *A History of Tax Avoidance* (Wisedene Ltd, London, 1989). This book discusses the use of charitable companies as part of a tax avoidance arrangement. Under s 20C of the Taxes Management Act 1970 (UK), statutory authority was given for the entry and search of premises, and seizure and removal of materials relevant to a suspicion of an offence of fraud having been committed. In *R v Inland Revenue Commissioners, ex parte Rossminster Ltd* [1980] AC 952 (HL) the breadth of this power was challenged and although condemned by Lord Denning in the Court of Appeal, was upheld as lawful by the House of Lords, provided the requirements of the statute were met. Andrew Watt, "Taxman goes on warpath" The Independent (online ed., United Kingdom, 21 May 1995).

[229] [redacted]

Chapter V
Inland Revenue Perceptions of Mr Russell

V Inland Revenue Perceptions of Mr Russell

[redacted][230]

[redacted][231]

[redacted][232]

[redacted][233]

---

230 [redacted]

231 [redacted]

232 [redacted]

233 [redacted]

[redacted]

A ‘verging on fraud’ comment was made in relation to Mr Russell and a receivership. In 1992 Mr Russell was ordered to pay $550,000 damages over the receivership of Auckland business Glen Eden Motors. Mr Russell’s company, Downsview Nominees, appointed Mr Russell as receiver after Downsview had bought out a first ranking bank debenture over Glen Eden Motors. Mr Russell ignored protests by second debenture holder First City Corporation, about the conduct of the receivership. Mr Russell spurned attempts by First City Corporation to pay off the Downsview debenture. The Privy Council criticised Mr Russell’s performance as a receiver, saying he continued the receivership in bad faith, his conduct verging on fraud.[234]

By early 1992 the Russell template and template cases had become a serious issue within Inland Revenue. The following chapter seeks to provide an understanding of Inland Revenue’s perceptions of Mr Russell before discussing the template and various track assessments. [redacted][235]

[redacted]

[redacted]

[redacted

A

236

1

237 238

239

240

236

237

238

239

240

[redacted]

[redacted]

[redacted]

2 [redacted]

[redacted][241]

[redacted]

[redacted][242]

---

[241] [redacted]

[242] The Taxpayer Compliance, Penalties, and Disputes Resolution Bill was introduced into Parliament in October 1995 and passed in July 1996. Fundamental defects in the areas of sanction meant that taxpayers who wished to "play the system", could do so, usually without risk of loss. However, under the compliance and penalties rules interest would be charged from the original due date. *IRD Tax Information Bulletin*, Vol. 8, No. 7, (October 1996) at 3 stated "The interest provisions have adopted a commercial approach, together with safeguards to ensure that Inland Revenue is not used as a financing or investment vehicle."

[redacted][243]

[redacted][244]

[redacted]

Although Inland Revenue have very robust information collection powers,[245] a difficulty can clearly arise if Inland Revenue are not aware of documents pertinent to a transaction.

---

[243] The High Court was established in 1841 and known as the Supreme Court until 1980. It is not to be confused with the current Supreme Court. The Supreme Court Act 2003 established in New Zealand a court of final appeal comprising of New Zealand judges to recognise that New Zealand is an independent nation with its own history and traditions. The Supreme Court replaced the Judicial Committee of the Privy Council located in London, and came into being on 1 January 2004, with hearings commencing 1 July 2004.

[244] [redacted]

[245] The TAA 1994 provides the Commissioner of Inland Revenue (and his delegated officers) wide ranging information collection powers. Many steps which might otherwise be regarded as intrusive of a person's privacy or their entitlement to not be the subject of search and seizure under the New Zealand Bill of Rights Act 1990 are justified because of s 16 TAA 1994. Section 16 provides the Commissioner with very broad powers of access to any premises and is not limited to the acquisition of evidence or information that may lead to or support a prosecution for an offence against the tax statutes: *Davies v Commissioner of Inland Revenue* (2004) 21 NZTC 18,675 (HC). Section 17 TAA 1994 also confers wide powers on the Commissioner to request any information in writing (including documents) for inspection, if the Commissioner considers them "necessary or relevant" for any purpose relating to the administration, enforcement, or any other function lawfully conferred on the Commissioner. There is also provision for examination before a District Court Judge to obtain information under s 18 TAA 1994 and before the Commissioner under s 19 TAA 1994. Section 19 authorises the Commissioner to issue a notice requiring any person (not just a taxpayer) to attend and give evidence before Inland Revenue officers and to produce all relevant documents in the custody or under the control of the person. A person who does not attend a s 19 inquiry or who attends and does not give the information requested commits an offence. Inland Revenue can also seek enforcement under s 17A TAA 1994 which provides for court orders concerning the production of information or tax returns. There are limitations on the Commissioner's powers, including the requirement for authorisation of the officer by the Commissioner to utilise the powers, the taxpayer is entitled to legal advice and also access to the courts; the information or documents requested must be "necessary or relevant" to the inquiry. The main limitation on the Commissioner's information gathering powers is legal professional privilege. Legal professional privilege can attach to both communications in which legal advice is sought and given, and also to communications in the context of litigation. This common law doctrine is embodied in s 20 TAA 1994. At common law, no privilege exists to protect

[redacted][246]

[redacted][247]

[redacted]

[redacted] In one of the first tax template cases, *Case M109*[248] (the *Ron West Motors* case), Judge Barber stated that the agreements prepared by Mr Russell:[249]

> …purport to have been signed on 31 December 1981. This would mean that the new arrangements took effect for the remaining months (90 days) of the 1982 income tax year.

However, Judge Barber concluded that the arrangement was not actually completed on the purported date stating:[250]

> I have already recorded that I do not accept, on the balance of probability, that the documentation was completed by 31 December 1981. It is not clear when the documentation was signed. A legal practitioner advised that although he had witnessed a number of documents dated 31 December 1981, that date could not have been correct as he was not working on that day.

---

confidential matters between an accountant and their client. Under s 20B to 20G TAA 1994 a form of statutory privilege for tax advisors exists known as the non-disclosure right. There are certain specific requirements in relation to the non-disclosure right. By way of example the right is not automatic - it must be claimed by the taxpayer (or their tax advisor); the document must have been intended to be confidential; and the advice is given by an approved advisor. For further discussion see Alistair Hodson, "Tax Administration" in *New Zealand Taxation*, above n 161.

246 [redacted]

247 [redacted]

248 *Case M109* (1990) 12 NZTC 2,690 (NZTRA).

249 At 2,699.

250 At 2,701.

[redacted]

There is no doubt that Mr Russell had tied up substantial resources within Inland Revenue. [redacted]

[redacted][1]

[redacted]

[redacted][2]

[redacted][3]

[redacted]

[redacted]

[redacted][4]

[redacted]

[redacted]

[redacted]

[1] [redacted]

[2] [redacted]

[3] [redacted]

[4] [redacted]

[redacted][255]

Prior to 1 April 2003, when an assessment of tax was in dispute and a taxpayer had requested a case be stated to the TRA or High Court by Inland Revenue, at least 50 per cent of the disputed tax had to be paid in accordance with Inland Revenue's assessment. The remaining 50 per cent was deferred until the court had determined the final liability.[256] [redacted]

[redacted][257]

[redacted][258]

---

255 [redacted]

256 A disputant was liable to pay non-deferrable tax relating to any tax in dispute on the due date for payment of the tax specified in the notice of assessment that was the subject of the challenge. The non-deferrable tax was 50 per cent of the tax in dispute. The requirement for taxpayers to pay half the tax in dispute was removed as from 1 April 2003, although a taxpayer may be required to pay all the tax in dispute if the Commissioner considers that there is a significant risk that the tax in dispute would not be paid should the challenge or objection proceedings by the taxpayer not be successful. Non-deferrable tax was also able to be provided to the Commissioner by way of acceptable security if the disputant was unable to pay the sum in cash. See also S 7A [Authorisation to take Securities] TAA 1994.

257 [redacted]

258 [redacted]

[redacted]

[redacted][259][redacted]

[redacted]

[redacted][260][redacted]

[redacted][261][redacted]

[redacted]

[redacted]

[259] *Case M109*, above n 248.

[260] S 414A ITA 1976 [Discretion to grant relief in cases of financial hardship].

[261] S 414A (1) ITA 1976 [Application for Relief] allowed relief at the Commissioner's discretion, if the Commissioner considered it necessary or desirable to do so in order to maximise the net present value of any recovery or likely recovery. This section has similarities with s 6A (3) TAA 1994 in respect to collecting the highest net revenue over time and s 177 TAA 1994 [Taxpayer May Apply for Financial Relief]. S 177B and 177C TAA 1994 address instalment arrangements and tax write-off by the Commissioner respectively.

[redacted][redacted][redacted][

[redacted][264]

[redacted][265]
[redacted][266]

[redacted]

[redacted][267]

---

264 [redacted]

265 [redacted]

266 [redacted]

267 [redacted]

[redacted]

[redacted][268] [redacted]

[redacted][269] [redacted]

[redacted][270]

[redacted]

[redacted][271] [redacted]

[redacted][272] [redacted]

---

268 [redacted]

269 [redacted]

[redacted]

270 [redacted]

271 [redacted]

272 [redacted]

[redacted]

[redacted][273][redacted]

[redacted][274][redacted]

[redacted][275]

[redacted]

[redacted]

[redacted

[redacted]

[redacted]

[redacted][276] [redacted]

[redacted]

[redacted]

[redacted]

[redacted][277]

[redacted]

[redacted]

[redacted][278]

[276] [redacted]

[277] [redacted]

[278] [redacted]

[redacted]

In 1982 an amendment[279] to the Companies Act 1955 was passed whereby this type of company structure was outlawed. [redacted][280]

[redacted][281] [redacted][282]

The Registrar of Companies took a case to the High Court.[283] An application was made to have the company appoint directors and secretary who were natural persons and not a body corporate or any other incorporated body or firm and to file the relevant prescribed form. The application was made pursuant to s 11 of the Companies Act 1955 which entitled the Court on the application of the Registrar to make an order directing the company to make good a default under the Act within such time as may be specified. The application came about as a result of a return by the respondent company of particulars of directors and secretary pursuant to s 200 of the Companies Act 1955 indicating the purported resignation of two limited liability companies as directors of Commercial Management Ltd showing that they had resigned on 26 June 1983, and in their place Commercial Management Partners and Commercial Management Associates, described as a company director and company secretary, respectively, "appointed" on 26 June 1983.

The orders[284] given by Heron J in the High Court[285] were subsequently followed by further litigation in the Court of Appeal[286] with orders obtained directing Commercial Management to

---

[279] Sections 180 and 181 of the Companies Act 1955 were created by virtue of s 12 Companies Amendment Act 1982 which came into force on 16 December 1982. Up until that time a limited liability company could be a director.

[280] [redacted]

[281] Commercial Management Ltd filed the prescribed form indicating the purported resignation of two limited liability companies as directors and the appointment of two partnerships. Each partnership comprised two incorporated companies and two natural persons. One of the partnerships was also purported to be appointed as secretary. The Registrar gave notice that the company was to appoint only natural persons as officers. The respondent claimed there was no requirement in the Companies Act 1955 that such officers should be natural persons and that only a body corporate or a person under 18 years were ineligible.

[282] [redacted]

[283] *Registrar of Companies v Commercial Management Ltd* (1985) 2 NZCLC 99,298 (HC).

[284] *Registrar of Companies v Commercial Management Ltd* at 5.

The orders given by Heron J in the High Court at 5 were:

name natural persons as directors and secretary. In the Court of Appeal decision counsel for the appellant submitted that while s 180(2) and 180(3) Companies Act 1955 both excluded bodies corporate from holding the positions of director and secretary, all other legal entities were capable of being appointed. A partnership, counsel submitted, was not a body corporate but was a legal entity entitled to act as director or secretary. The appeal was dismissed. The Companies Act 1955, having provided in s 180 (2)(a)[287] and s 181 (3)[288] that a body corporate is not capable of being appointed or holding office as either a director or secretary of a company, cannot be circumvented by the appointment to either office of a partnership in which a body corporate is a partner. A partnership is not a legal entity capable of being appointed and holding office as a director.[289]

Mr Russell stated in a 2011 interview[290] that the reason he had structured the various entities without being named personally was due to the 'bad press' after the Securitibank collapse. He stated that it was all right for those that knew him, but for those that did not, it was better that his name was not associated with the Commercial Management business.

A perspective of Mr Russell in a non-tax sense is found in an August 1989 case, on the cusp of the first of the 'Track A' litigation Gault J provides an account of the conduct of Mr Russell that was under scrutiny in *First City Corporation Ltd v Downsview Nominees Ltd & Ors (No. 2),* a case concerning receiver negligence, stating as follows:[291]

---

1. Directing the respondent company to appoint within one month of the date of the order directors who were natural persons.
2. That the respondent company appoint within one month of the order of the Court a secretary or secretaries who were natural persons.
3. That the respondent company furnish within 14 days of the date of appointment hereinbefore ordered a return in the prescribed form containing all the required particulars of persons so appointed as directors or secretary of the said company.
4. That the respondent company pay costs in the sum of $500 together with disbursements as fixed by the Registrar.

[285] *Registrar of Companies v Commercial Management Ltd*, above n 283.

[286] *Commercial Management Ltd v Registrar of Companies* [1987] 1 NZLR 744 (CA); (1987) 3 NZCLC 100,221.

[287] Section 180. Directors –
(1) Every company shall have at least 2 directors.
(2) The following shall not be capable of being appointed or holding office as a director of a company, namely, -
(a) A body corporate
(b) A person who has not attained the age of 18 years.

[288] Section 181. Secretary –
(1) Every company shall have a secretary.
(2) …
(3) A body corporate shall not be capable of being appointed or holding office as a secretary of a company, or as an assistant or deputy secretary of a company, or of being authorised generally or specially in that behalf by the directors.

[289] The partners may, however, be individually appointed as directors. The Companies Act 1955 envisaged the office of director as being held by one individual and not held jointly by two or more persons as this is quite foreign to the concept of the office of director which calls for individual judgment and responsibility.

[290] Interview with Mr J G Russell, above n 1.

[291] *First City Corporation Ltd v Downsview Nominees Ltd (No. 2)* (1989) 4 NZCLC 65, 192 (HC) at 20.

> Mr Russell does not lack confidence in his ability. To some extent that may be justified. Clearly he is capable and knowledgeable in matters of accounting, commercial financing and insolvency. In this last field his working knowledge of the law is quite extensive, but in practice he prefers to focus on how he might best serve his immediate objectives rather than the underlying purposes of the rules of law and practice.

His Honour continued:[292]

> I found Mr Russell a man who tends to offer as reasons or justification for his actions, what is convenient rather than what is correct.

[292] At 21. One result of this case was that Mr Russell was prohibited under s 189 of the Companies Act 1955 without the leave of the court from being a director or promoter of or being concerned in or taking part in the management of any company for a period of five years. The Court of Appeal held that Gault J lacked jurisdiction under s 189 Companies Act 1955 to prohibit Mr Russell from acting as a director or promoter or being concerned in the management of a company. Their Lordships in the Privy Council agreed for the reasons given by Richardson J in the Court of Appeal: *Downsview Nominees Ltd v First City Corporation Ltd* [1990] 3 NZLR 265 (CA); (1990) 5 NZCLC 66,303 (CA) and *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 51; (1993) 11 ACLC 3,101 (PC).

B

[redacted][293] [redacted]

[redacted][294] [redacted][295] [redacted]
[296] [redacted]
[redacted]
[297]

[293] Mr Russell may have felt that Inland Revenue were also effecting delay by directing matters to people with little or no experience in *Case U11* (1999) 19 NZTC 9,100 (NZTRA). Mr Russell had spent many days cross-examining Mr Clearkin, an Inland Revenue witness. Judge Willy, at 9,138 stated in relation to Mr Clearkin, that he had been subjected to "days of gruelling examination on matters of which he had very little first-hand knowledge."

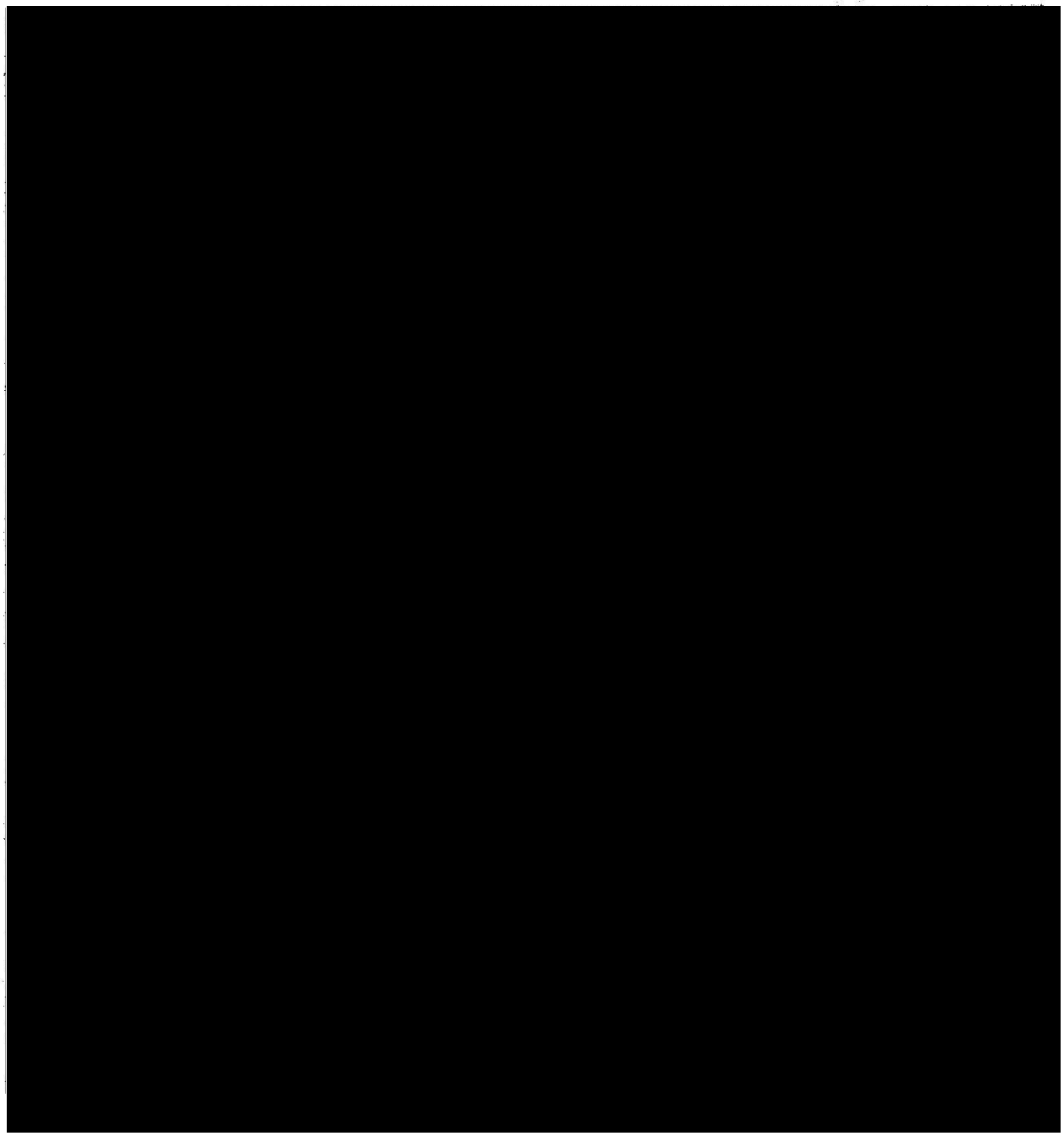
[294] [redacted]

[295] [redacted]

[296] [redacted]

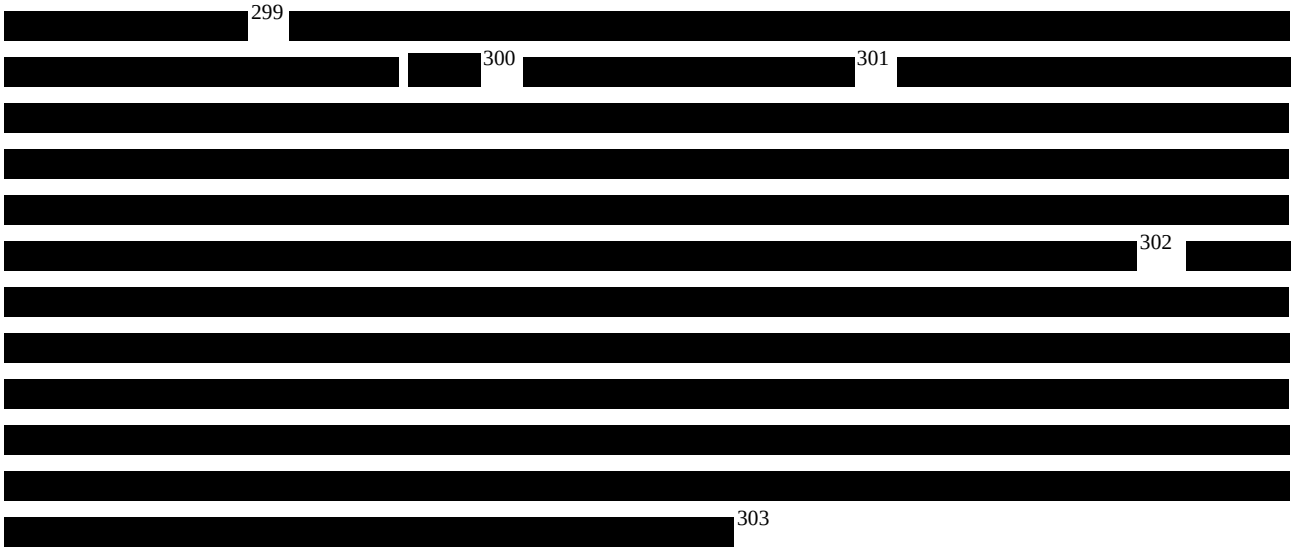
[297] [redacted]

C [redacted]



[redacted]298

298 [redacted]



299 300 301 302 303

299

300

301

302

303

It has to be remembered that a lot of Mr Russell's accounting and advisory business was not template related,[304] and that any increase in investigations or concerns requiring answers from taxpayers has to be carefully balanced with regard to compliance costs for the taxpayers. [redacted][305]

[redacted][306]

[redacted][307][308][309][310]

[304] A significant percentage of Mr Russell's consultancy business was connected with insolvency type work. He had over 1,000 active clients, clearly not all template related clients.

[305] [redacted]

[306] [redacted]

[307] [redacted]

[308] [redacted]

[309] [redacted]

[310] [redacted]

[redacted]

[redacted][311]

[redacted]

[redacted]

[redacted][312]

[redacted]

[redacted][313]

[redacted]

[redacted]

[redacted][314]

311 [redacted]

312 [redacted]

313 [redacted]

314 [redacted]

[redacted]

However, the magnitude of the tax template 'problem' became evident during the 1980s and this led to the two Auckland cases, *M104*[315] and *M109*[316] being test cases to allow the courts to determine what was acceptable and what was not. After the success of *Cases K28*[317], *M104*[318] and *M109*[319] the Commissioner continued to investigate Mr Russell [redacted]

Inland Revenue reassessed the client companies ('Track A'), however, the companies had by then been stripped and the Inland Revenue victories were 'worthless' in dollar terms. [redacted][320]

As a result of the asset stripping that had occurred under 'Track A', a new approach commenced, a reconstruction under s 99(3) ITA 1976 to assess the individual taxpayers with 100 per cent of the income diverted. [redacted][321]

[315] *Case M104* (1990) 12 NZTC 2,660 (NZTRA).

[316] *Case M109*, above n 248.

[317] *Case K28* (1988) 10 NZTC 257 (NZTRA).

[318] *Case M104*, above n 315.

[319] *Case M109*, above n 248.

[320] [redacted]

[321] [redacted]

Interestingly s 276 of the ITA 1976 was modified with application to tax on income derived in the 1992–93 income year and subsequent years and in the case of an arrangement entered into after 8pm New Zealand Standard Time on 30 July 1991 to tax on income derived in any earlier year. Prior to the law change the section heading read ‘Liability of New Companies for tax payable by former companies with substantially same shareholders or under same control’.

After the change it read ‘Liability for tax payable by company left with insufficient assets’. It would be a straightforward hypothesis to suggest that this section of the statute was changed to address the type of asset stripping that had occurred and had become apparent under the ‘Track A’ route, which addressed liability for tax payable by a company left with insufficient assets.

[redacted][322]

[redacted]

[redacted][323]

[redacted]

[redacted]

One suspects that specific issue meetings may have been held more frequently. [redacted]

[redacted]

322 [redacted]

323 [redacted]

[redacted]

[redacted][324][redacted]

[redacted]

[redacted]

[

1 Attempting to obtain the Russell Team minutes

Mr Russell has argued that he has been unable to access certain documents that may have helped him in his vendetta argument. Perhaps the most useful case in relation to this argument is *Case W37*.[325] Judge Barber was ruling on legal professional privilege for minutes of certain monthly meetings of the Tax Avoidance Unit.[326] Mr Ruffin, Inland Revenue counsel, submitted that litigation privilege is a type of legal professional privilege.[327] Mr Judd, acting for Mr Russell, extensively addressed the concept of legal privilege being subject to the 'fraud exception'.[328]

Mr Judd submitted that if the so called 'fraud exception' applied regarding the Russell Team minutes of 31 March 1995, that Judge Barber did not need to inspect the documents but should simply direct them to be produced.[329] Judge Barber took Mr Judd's approach on this issue to be that the Commissioner's general conduct in the Russell template cases could constitute 'fraud', for the purpose of the fraud exception to legal professional privilege, particularly in terms of non-compliance with s 6 TAA 1994 (requiring care and management of the tax system). Mr Judd had also submitted that the Commissioner was subject to the Bill of Rights Act 1990 (BORA) where the Crown affirms, and is required to protect and promote, citizens' rights to natural justice in hearings before tribunals, which included the TRA. Mr Judd stated:[330]

> Fraud in the present context "includes all forms of fraud and dishonesty (per Goff J (ibid)), "anything of an underhand nature or approaching to fraud" (per Kekewich J, quoted by Vinelott J (ibid)), "communications made for the purpose of frustrating the processes of the law itself even though no crime or fraud is contemplated", and "abuse of statutory authority and by that abuse [proving] others from exercising their legal rights under the law" (per O'Keefe J's quotations).

---

[325] *Case W37* (2004) 21 NZTC 11,360 (NZTRA). Referred to in *Case W49* (2004) 21 NZTC 11,454 (NZTRA).

[326] Judge Barber was dealing with submissions from each party in relation to the claims of legal professional privilege for minutes of 'monthly' meetings over the period 31 March 1995 to 23 August 2002 of persons initially called 'J G Russell Co-ordination Team' and subsequently variously called that, or 'J G Russell Committee', or 'Russell Team', or 'Tax Avoidance Team', or 'Tax Avoidance Unit' but coupled with 'litigation meeting'.

[327] See *Dinsdale v Commissioner of Inland Revenue* (1998) 18 NZTC 13,583 (CA) where the nature of litigation privilege was restated by Blanchard J.

[328] The two cases below are referred to in *Case W37*, above n 325, at [30]. Mr Judd submitted that there have been various explanations of what is required to bring circumstances within the 'fraud' exception. These are discussed by Vinelott J at some length in *Derby & Co Ltd v Weldon (No 7)* [1990] 3 All ER 161 (Ch.). A quotation from His Lordship from the judgment of Kekewich J in *Williams v Quebrada Railway Land & Copper Co* [1895] 2 Ch 751 at 172b includes: "...where there is anything of an underhand nature or approaching to fraud, especially in commercial matters, where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the Court…"

[329] Mr Judd referred extensively to *Case U11*, above n 293. This decision was reversed on appeal to the High Court in *Commissioner of Inland Revenue v Dandelion Investments Ltd* (2001) 20 NZTC 17,293 (HC) which was in turn confirmed by the Court of Appeal in *Dandelion Investments Ltd v Commissioner of Inland Revenue* [2003] 1 NZLR 600 (CA); (2003) 21 NZTC 18,010.

[330] *Case W37*, above n 325, at [34] referred to by Mr Judd at 4.16 of his submission.

Interwoven in the submission by Mr Judd was reference to 'vendetta'[331] on the theme, apparently, that the conduct of the Commissioner amounted to a deliberate obstruction of the objector's rights to have the merits of cases put before the Court because of personal dislikes. Essentially Mr Judd was submitting that if the Commissioner was carrying out a vendetta against Mr Russell and his clients which manifests itself in improper behaviour, such as deluging Mr Russell with s 17 notices and then prosecuting him when he is unable to do the impossible, that constituted conduct within the description of fraud for the purpose of the fraud exception to legal professional privilege, and comes directly within the description in the case authorities of conduct stated (earlier) which is preventing others from exercising their legal rights.

Mr Judd referred to the rights to a fair hearing being affirmed by the BORA, and that the Commissioner cannot claim privilege for documents which record the plans being made by his officers and legal representatives for legal campaigns against Mr Russell and his clients, and that these documents should be fully disclosed to the Court, and that the Russell Team minutes are such documents and must be fully disclosed.

Mr Judd further submitted that it was not for the TRA to look at documents to decide whether they do or do not disclose a vendetta, as that would be a prejudgment of the very issue before the TRA, and if there is evidence of a vendetta (and it is within the meaning of 'fraud' for this purpose), the documents must be yielded up so that Mr Russell can use them to prove the cases of his clients.

Judge Barber was conscious of the submissions from Mr Judd that such documents must be disclosed because of the applicability of the 'fraud' exception, and appreciated that the vendetta theme had been raised in relation to that possibility.[332] Judge Barber was given a black radofile of the said minutes of the meetings between 31 March 1995 and 23 August 2002 over which legal privilege was claimed.

In terms of the law, Judge Barber ruled that the minutes were clearly subject to legal professional privilege as they recorded communications between the Commissioner's staff and his legal advisors, and recorded advice received on the conduct and progress of litigation arising out of the

[331] At [34]: Mr Judd referred to The New Shorter Oxford Dictionary including as a meaning of 'vendetta' to be "a prolonged bitter quarrel with or campaign against a person".

[332] *Case W37*, above n 325, at [39].

Russell template cases, and whether prosecutions should be initiated.[333] Judge Barber[334] referred to *B v Auckland District Law Society*,[335] a Privy Council decision where Lord Millett emphasised:[336]

> Some principles are well established and were confirmed by Lord Taylor CJ in *R v Derby Magistrates' Court*, ex p B at p 530G-H. First, the privilege remains after the occasion for it has passed: unless waived: once privileged, always privileged. Secondly, the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings and whether by the prosecution or the defence. Thirdly, the refusal of the claimant to waive his privilege for any reason or none cannot be questioned or investigated by the Court. Fourthly, save in cases where the privileged communication is itself the means of carrying out a fraud, the privilege is absolute. Once the privilege is established, the lawyer's mouth is "shut for ever"; (see *Wilson v Rastall* (1792) 4 Durn & E 753, at p 759 per Buller J). The Society has not alleged that any of the documents fall within the excepted category, but if any of them does it retains the right to make such a claim hereafter.

This was regarded by Judge Barber as a correct statement of the law in New Zealand. It is clear that the fraud exception is limited to "cases where the privileged communication is itself the means of carrying out a fraud."[337] Judge Barber held:[338]

> …there has been nothing in these cases resembling fraud from the Commissioner of Inland Revenue, his officers and/or external legal advisors. There may have been some lack of co-operation or even, perhaps ill-will sometimes; but it is preposterous to even suggest anything resembling fraud, even of some technical type, against the Commissioner or his staff or contractors. I say this having been closely involved in these Russell tax avoidance template cases since their inception in about 1989….

Judge Barber summed up by stating:[339]

> Quite frankly, it seems to me that Mr Russell and his advisors are deliberately using due process in these template tax-avoidance cases to conduct a huge fishing expedition in the hope of somehow finding a golden technical argument to save the day for Mr Russell and his clients.

---

[333] Judge Barber noted that if the occasional 'aside remark' is not part of the privilege it was irrelevant to any objection proceedings. Further, some staffing and administration matters were covered, but they were irrelevant to any assessments.

[334] *Case W37*, above n 325, at [49].

[335] *B v Auckland District Law Society* (2003) 21 NZTC 18,221 (PC) at [44].

[336] *Case W37*, above n 325, at [49].

[337] At [50].

[338] At [51].

[339] At [52].

In relation to the 'nub' of the template scheme, the use of tax losses, Judge Barber continues:[340]

> In the terms of the many cases heard before me on this template, I can only see a situation of clear tax avoidance. I note the feature that the losses used, in effect, in an endeavour to convert income into capital, are genuine losses incurred by somebody (other than Mr Russell) and that, perhaps, if the law had been followed at material times in terms of corporate group use of tax losses, there could have been some tax savings; but that did not happen.

2 The car park files and the Ponsonby businessman

Mr Russell did, however, obtain a copy of the minutes from one of the Russell Team meetings in rather unusual circumstances. He received a call one day from a Ponsonby businessman who had found a file lying in a car park as he was walking back to his car. Mr Russell could not recall the man's name, but he said that he would never forget the man's words as he thought they were very funny. The man from Ponsonby said, in relation to the file that, "I must say it made very interesting reading!" The businessman continued:[341]

> I thought anybody that can cause Inland Revenue so much trouble must be a good fellow so I am ringing you up and offering you this file…

In the TRA decisions[342] discovery issues[343] were addressed, including the car park files. Ultimately when Mr Russell presented the minutes in court they were held to be legally privileged even though both Mr Russell and the Ponsonby businessman had read them.[344] [redacted][345] Mr Russell

---

[340] At [52].

[341] Interview with Mr JG Russell, above n 156.

[342] *Case W24* (2003) 21 NZTC 11,246 (NZTRA); *Case W35* (2004) 21 NZTC 11,340 (NZTRA); *Case W36* (2004) 21 NZTC 11,353 (NZTRA); *Case W38* (2004) 21 NZTC 11,372 (NZTRA); *Case W39* (2004) 21 NZTC 11,375 (NZTRA); *Case W34* (2004) 21 NZTC 11,334 (NZTRA).

[343] There were five interlocutory decisions relating to certain participants of the J G Russell tax avoidance template. *Case W36*, above n 342 dealt with an issue of waiver of confidentiality of the minutes of a Russell Team meeting, dated 1 September 1995. A copy of these minutes were apparently found in a car park in Auckland by an unidentified member of the public, and given to Mr Russell. The Commissioner argued that the minute was confidential and covered by legal professional privilege, which had not been waived. The Commissioner further applied that the minute and copies of it be returned to the Commissioner. Judge Barber held that the minute was confidential and privileged and that it was inadmissible in the proceedings. His Honour also held that it was in any event irrelevant.

[344] Section 20 TAA 1994 provides that any information or book or document is privileged from disclosure if it is a confidential communication (whether written or oral) passing directly or indirectly between legal practitioners in their professional capacity and a client, or legal practitioners in their professional capacity and it is made for the purpose of obtaining or giving legal advice, and it is not made for the purpose of committing some illegal or wrongful act.

[345] [redacted]

officially ‘retired’ in 1999 so this appears to be likely. [redacted]

Chapter VI
The Russell Template

VI The Russell Template

"…once upon a time…there was the Russell Template…"[346]

A Introduction

Prima facie one may consider that any arrangement to pay less or no tax would have attracted many takers for such an opportunity. Mr Russell's view of the template was that he was never a risk to the New Zealand tax base as some would suggest because in his opinion it was extremely rare for the circumstances to arise for someone to use the tax template. He stated:[347]

> …there was no way could a wage earner use it…no way could a professional person use it…and it's only those people who are prepared to sell their enterprise to someone else and then just work for it…and not own it…now there's very few people that would do that…I think if you went up and down the street and said if you were prepared for more money to not own your own house, not own anything and just work for someone else…most people say no…we want to own our house…we want to own our own business and they don't care if they only make half the money…they must own it…the pride of ownership is far more important…

Mr Russell also found this sentiment with regard to people settling trusts. Some settlors struggled to realise they had actually disposed of their property. Mr Russell considers his arrangement is simple. Mr Russell maintained justification of the template by way of paying an inflated price for the business due to the fact that they would pay a premium for the profitable business as they were not paying cash. The agreement also provided to keep the previous owner running the business to make use of their expertise.

The purpose of the agency and management agreements was to permit the principal parties to derive an income in a manner that complied with the statutory provisions regarding insolvency. Had there been no agency and management agreements the principal partners would have been regarded as directly trading in the market place which would have been a breach of company law. In addition, the receiver is personally liable for such trading. The whole purpose of the template structure was to buy an income stream for a company with genuinely incurred tax losses. This has always been the issue at the heart of the Russell template and where Mr Russell and Inland Revenue strenuously disagree.

---

[346] *Russell v Commissioner of Inland Revenue*, above n 32, per Stevens J, 1 February 2012, Wellington.

[347] Interview with Mr JG Russell, above n 156.

Following is a reproduction of the Russell template as drawn by Mr Russell:

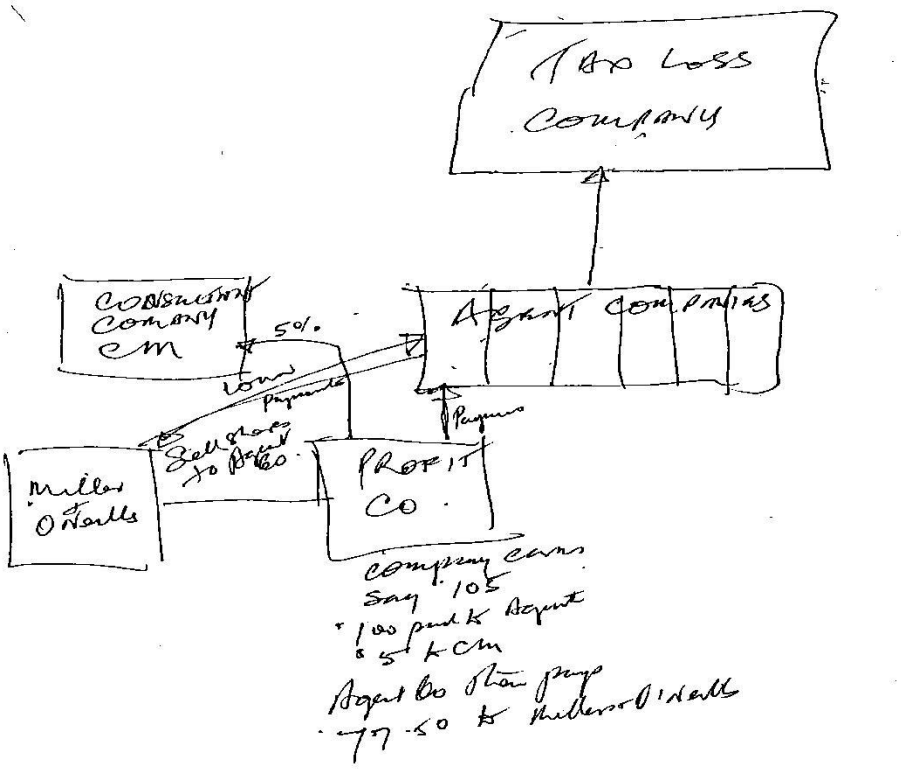


Figure 6: The 'Russell template', drawn by Mr J G Russell, 27 January 2010.

Mr Russell described the template transaction as follows:[348]

> It's a tax loss company that has got tax losses buying an income stream….you could only do this type of transaction if you were a tax loss company…and therefore the arrangement didn't generate the tax advantage…it was *the fact that the company had tax losses that generated the tax advantage*…now there is nothing wrong with that and no one has ever suggested that there was…then it can't be tax avoidance…because that is all the company did…was buy an income stream to use up its tax losses. (emphasis added).

The TRA once estimated that up to 1,100 smaller businesses including up to 3,500 individuals had been affected by the template.[349] This number is hotly disputed by Mr Russell and there appears

[348] Interview with Mr JG Russell, above n 156.

[349] *Case T52* (1998) 18 NZTC 8,378 (NZTRA) at [121] where Judge Barber states "there has been reference to a possible 1,100 companies having the Russell template implant (that would translate into affecting the lives of at least 2000, but probably about 3500, individuals) but, at another stage, the reference was to 500 such companies. I believe that only 76 such groups have, so far, places on my Register." Judge Barber continues "All in all, I see the picture as a sad mess which could benefit from the attention of the Executive and of Parliament."

to be some speculation as to the exact number of entities and people affected by the template litigation. Mr Russell stated that the template can only ever be put in place with people who are prepared to sell their income earning asset to somebody else. He found that very few people in business in New Zealand wanted to do so. In 1998 after almost a decade of template litigation it was reported:[350]

> Cases involving another 70 odd companies are in the pipeline. The latest ruling affects an estimated 1100 companies and up to 3500 individual investors. Many will not have the cash to meet the tax bill now landing in their lap. That means bankruptcy.

[redacted][351] **Appendix 4** of this thesis contains a selection of template related companies.

In *Case T52* Judge Barber states:[352]

> …on the face of it, many taxpayers have been put into the mess I have described, but Messrs Grierson and Russell seem convinced that the law will eventually come out in their favour. Perhaps it will, but I think such an outcome is most unlikely.

[350] Mike Ross, "Thousands of individuals to pay as tax schemes are unravelled" *The National Business Review*, (online ed., New Zealand, 8 May 1998) at 61.

[351] [redacted]

[352] *Case T52*, above n 349, at [121].

B The Russell Template Discovered – The Pakuranga House Call

The powers of the Commissioner, and by delegation to other officers of Inland Revenue, are very extensive. The Commissioner or any authorised officer of Inland Revenue are granted full and free access for the purposes of inspecting any book and documents together with any property, process or matter.[353]

Although Mr Russell has had numerous requests for information under s 17 TAA 1994,[354] he has never been the subject of a s 16 TAA 1994[355] notice allowing the Commissioner access to search his premises to obtain information.[356] [redacted][357] [redacted][358] The Russell template documents were initially found to exist after a search of his accounting practice premises by the Department of Justice.[359]

After the well-publicised Securitibank collapse, being the largest corporate collapse in New Zealand history at the time, Mr Russell claimed it was difficult to have any employment opportunities and this led him to start Commercial Management, initially run out of a small office in Upper Queen Street, central Auckland, and ultimately run out of his family home in Pakuranga. Mr Russell stated:[360]

> There was no point really in applying for a job anywhere…while you are successful you are a financial genius, if you are unsuccessful you are a crook…that is basically the way you are looked at in New Zealand.

---

[353] See section 16(1) TAA 1994.

[354] Section 17 TAA 1994 [Information to be furnished on request of Commissioner].

[355] Section 16 TAA 1994 [Commissioner may access premises to obtain information].

[356] Mr Russell was convicted of failure to furnish certain information pursuant to a s 17 Inland Revenue Department Act 1974. A conviction was entered on 30 October 1989. The Commissioner issued further notices in identical terms and Mr Russell applied for judicial review of all of the notices, seeking an order declaring the notices *ultra vires*. Mr Russell submitted that the information was sought as part of a 'fishing expedition' or roving inquiry without any cause for suspicion, and secondly that the Commissioner was using the s 17 provisions improperly and unreasonably. Smellie J struck out the application in *Russell v Latimer* (1990) 12 NZTC 7,321 (HC).

[357] [redacted]

[358] [redacted]

[359] The Department of Justice was created in 1872. In 1995 it was split into three parts, the Ministry of Justice, dealing with policy matters, while the practical administration of the courts and prison system were given their own departments.

[360] Interview with Mr J G Russell, above n 23.

Mr Russell stated that he had "quite a few people come along to me and want me to rescue their businesses and all that sort of thing…."[361] He considered that if half the businesses that came his way could be turned around and saved, that was a very good percentage. So Commercial Management began with just a few clients and experienced rapid growth.

Mr Russell placed some initial advertisements in the *Accountant's Journal*. He had never placed advertisements in the newspaper. He soon found that he could not handle the volume of work, as word of mouth recommendations to promote his business flourished. He shifted Commercial Management from the Upper Queen Street premises to his home at Pakuranga. Having had five children the Russell's had purchased this house in 1971. It had seven bedrooms and as children left the home to go flatting or get married Mr Russell "speedily converted their room into an office!"[362] Six rooms were converted into offices and a lounge was used for meetings with clients.

Figure 7: Downsview Road, Pakuranga, Manukau City, Auckland

The business was very well organised with a booking system for the meeting room (the lounge) initiated and daily lunch was provided by Melva, John's wife, for all the staff. Mr Russell had shifts of accountants working from 4am in the morning until 11pm at night.[363] With this activity all being

[361] Interview with Mr JG Russell, above n 23.

[362] Interview with Mr JG Russell, above n 156. Mr Russell displays his sense of humour during our interview by saying that it was hard to convince Melva his wife of the need for the additional room as an office at one stage saying 'Look Melva, we have got to do this because (1) we need it for the business, and (2) if we don't, they [the children] might come back!'

[363] The long hours worked from a suburban home led to complaints by neighbours to the local council. The bylaws allowed employment of 3 people and the proprietor, not over 50 people. Mr Russell applied for resource consent in 1996. The Council reached agreement with Mr Russell to continue the activity at 6 Downsview Road. The Commercial Management staff numbers were declining and Mr Russell had advised the Council he would officially

run out of a suburban home it is unsurprising it led to official complaints made by neighbours to the local council. Staff shared the desks but each had their own drawer in a desk that belonged specifically to them. Ultimately staff numbers peaked at 59.[364] Mr Russell stated he had no problem getting good staff[365] as a lot of people found the flexibility of hours very suited to them, especially young mothers that had previously been full time accountants, who could work a couple of days a week at unusual hours suiting their other family responsibilities.

Figure 8: The lounge (meeting room for clients)

Mr Russell did have success in the 'doom and disaster business' as he referred to it. There were also the real disasters too, the real doom and gloom businesses that could not be rescued in any way.

When Mr Russell was away on business visiting clients his practice while away was to ring his office to make sure everything was 'running smoothly'. He had been on a business trip visiting clients in Matamata. On this particular trip in 1989[366] when Mr Russell spoke to one of his staff

---

retire in 1999. The council granted resource consent on that basis. Mr Russell shifted the location of Commercial Management to his current home at 1439 Clevedon-Kawakawa Bay Road in 1999 with no employed staff.

364 The 6 Downsview Road property sold at auction in September 2012. The floor space was estimated at approximately 280m2, not an overly large amount of space to occupy 59 employees. A trust associated with Mr Russell had owned the property for over 40 years. The business had operated from this location for over 17 years.

365 Mr Russell had employed at one stage an ex-District Commissioner of Inland Revenue. Mr Russell stated that 'he was a very good man to employ' and had asked him at his interview how he would manage shifting from being the 'gamekeeper' to 'poacher'. The ex-District Commissioner stated that he would have no problem in changing roles. Mr Russell recalled that this gentleman he had quite a sense of humour. A group of ex Inland Revenue Commissioners would meet once a month at a club in Remuera for a general catch up. Mr Russell told how his new employee told the other Commissioners that he was now working for John Russell. He said "you could have heard a pin drop!"

366 [redacted]

members he was told that there were "a couple of guys sitting in a car….looks like they are staking the place out".[367] Naturally, this was of concern to Mr Russell so he decided to head back to Auckland immediately. In 1989 about 75 per cent of Commercial Management's business was template related.

When he arrived home he saw "a huge truck there with an army of people carrying files out of my house".[368] Ian Ramsay, the former head of the Justice Department's Corporate Investigations Unit, was there with a Court Order. Mr Russell stated that there were several policemen there as well, so they "must have been expecting a big fight".[369] Mr Russell asked to have a look at the Court Order and saw that it provided authority to only take a couple of files.

[redacted] Although Mr Russell confirmed that Inland Revenue had never come and physically searched his house he told me "but don't talk too loud…it might give them an idea…he he…."[370]

[redacted]

[367] Interview with Mr JG Russell, above n 23.

[368] Interview with Mr JG Russell, above n 23

[369] Interview with Mr JG Russell, above n 23.

[370] Interview with Mr JG Russell, above n 23.

C

Tax losses were integral to the template structure.

[redacted][376]

[redacted][377]

[redacted][378]

[redacted][379]

[redacted]The latest Receivers Report under s 24 Receiverships Act (filed 4 January 2012) shows an amount owing to the debenture holder of $368,433,797. This gives an idea of the amounts accumulating under a debenture. To illustrate this I looked at several years of Reports filed under the Receiverships Act 1993 with respect to this company. The growth of the debenture is as follows:

[376] Interview with Mr JG Russell, above n 156.

[377] Interview with Mr JG Russell, above n 156.

[378] Interview with Mr JG Russell, above n 156.

[379] Interview with Mr JG Russell, above n 1.

Period of report (six monthly)	Amount owing to Debenture Holder
7 April 1997 to 6 October 1997	$64,592,295
7 October 1997 to 6 April 1998	$77,953,392
7 April 1998 to 6 October 1998	$77,953,392
7 October 1998 to 6 April 1999	$93,455,545
7 April 1999 to 6 October 1999	$93,455,545
7 October 1999 to 6 April 2000	$111,615,499
7 April 2000 to 6 October 2000	$111,615,499
7 October 2000 to 6 April 2001	$133,938,598
7 April 2001 to 6 October 2001	$133,938,598
7 October 2001 to 6 April 2002	$160,726,318
7 April 2002 to 6 October 2002	$160,726,318
7 October 2002 to 6 April 2003	$192,871,582
7 April 2003 to 6 October 2003	$192,871,582
7 October 2003 to 6 April 2004	$206,880,776
7 April 2004 to 6 October 2004	$206,880,776
7 October 2004 to 6 April 2005	$223,160,654
7 April 2005 to 6 October 2005	$223,160,654
7 October 2005 to 6 April 2006	$242,696,508
7 April 2006 to 6 October 2006	$242,696,508
7 October 2006 to 6 April 2007	$266,139,532
7 April 2007 to 6 October 2007	$266,139,532
7 October 2007 to 6 April 2008	$294,271,161
7 April 2008 to 6 October 2008	$294,271,161
7 October 2008 to 6 April 2009	$328,029,116
7 April 2009 to 6 October 2009	$328,029,116
7 October 2009 to 6 April 2010	$368,538,662
7 November 2009 to 6 May 2010	$367,922 (sic)
7 October 2010 to 6 April 2011	$368,433,797
7 April 2011 to 6 October 2011	$368,433,797

(Sourced from *www.business.govt.nz* on 27 December 2012).

This shows the steady growth of a debenture held over the company.

RECEIVERSHIPS ACT 1993

Receiver's Report under Section 24

Mercantile Developments Limited (In Receivership and Liquidation)
AK084006

Period of Report: 7 April 2011 to 6 October 2011

Receipts and property disposed of since last report:

Nil

Payments made since last report:

Nil

(a)	Amount owing to Debenture Holder	$368,433,797
(b)	Amount owing to Preferential Creditors	$37,185
(c)	Amount likely to be payable to creditors other than (a) and (b) is NIL	

J G Russell
Receiver

Date 14 November 2011

D Precursor Cases – Case K28 *and* Case L85

There are two 'pre-template' cases that reflect aspects of the Russell tax template. *Case K28,*[380] the earlier case of the two, addressed the issue of whether an 'administration fee' was an allowable deduction.[381] *Case L85*[382] considered the words 'of a temporary nature' in the context of tax avoidance. Mr Russell did not consider these as relevant in relation to the template litigation but these cases do show the courts considering aspects of what later became part of the template – the administration fee and its validity, and the transfer of shareholding.

1 Case K28 – *deductibility of the administration fee*[383]

Case K28[384] was a precursor to the 'Track A' template cases *M104*[385] and *M109.*[386] A reply to Mr Russell's advertisement led to the organising of the sale and purchase of the shares in a shell company which had become insolvent. The parent company charged an administration fee. The amount of the fee would be set-off against tax losses. The shareholders of a property development company, in response to an advertisement initiated by Mr Russell, purchased 60 per cent of the shares in a tax loss company through a nominee company which they wholly owned.[387] The purchase price paid to the vendors was immediately advanced back to the nominee company for the purpose of paying the former creditors of the shell company once tax benefits were utilised.

Contemporaneously, the shell company purchased 100 per cent of the shares in the property development company thereby becoming its parent company. The parent company charged its subsidiary development company an administration fee which it then sought to deduct under s 104 ITA 1976.[388] Conversely, the parent company sought to offset the income received from its tax loss. The accounts of the parent company showed that the development company had been advanced a sum equal to the amount of the administration fee. This sum was apparently later repaid. The

---

[380] *Case K28*, above n 317.

[381] The objector was a property development company.

[382] *Case L85* (1989) 11 NZTC 1,485 (NZTRA).

[383] [redacted]

[384] *Case K28*, above n 317.

[385] *Case M104*, above n 315.

[386] *Case M109*, above n 248.

[387] The agreement for sale and purchase of the tax loss company shares had to be nominally for only 60 per cent to comply with the provisions of s 188(7) ITA 1976 (prior to its amendment by the Income Tax Amendment Act 1980 s 40(3) as from 1 April 1980.

[388] Section 104 ITA 1976 [Expenditure or loss incurred in production of assessable income], now s DA 1 (1) [Nexus with income] ITA 2007.

Commissioner disallowed the deduction pursuant to s 99 ITA 1976 so the arrangement was never completed.

There were allegations raised by Inland Revenue that certain documents were backdated so as to circumvent legislation introduced with effect from 1 March 1980. It was the tax inspector's belief that various documents involved had been backdated to 21 February 1980 "…so as to circumvent legislation introduced with effect from 1 March 1980."[389] Bathgate J doubted whether any of the documents mentioned were completed on that date. [redacted][390] [redacted][391] [redacted]

[redacted]

Ultimately the deduction claimed for the administration fee was disallowed. It was held that the purpose or effect of the deduction was tax avoidance rather than tax mitigation.

2 Case L85 – *A 'temporary' transfer of shares*

It would appear that the first case to be litigated where tax avoidance and loss offsets between companies involving Mr Russell was *Case L85*.[392] A private company sought to have losses from another company set-off against its assessable income for the 1980 financial year.[393] The private company entered into an agreement[394] to temporarily purchase shares in a loss company,[395] so as to satisfy the grouping requirements of s 191 ITA 1976,[396] and to enable the losses to be deducted from the private company's assessable income.

---

[389] The effect of the legislation introduced with effect from 1 March 1980 was never spelt out by counsel for the Commissioner, nor was it relied upon at the hearing to support the Commissioner's case.

[390] [redacted]

[391] [redacted]

[392] *Case L85*, above n 382.

[393] These losses were allocated in the 1980 return of income to the objector, which declared its assessable income as $78,831.19 but deducted the so called accumulated losses of the company (and a small loss brought forward from the previous year). The amount of income tax at issue in this case was $35,441.55.

[394] An agreement was signed between the private company as the purchaser, a Mr RSC and Downsview Nominees Ltd as the vendors, for the sale and purchase of ordinary shares in the company in February 1980.

[395] On 31 March 1980 the company had losses of $79,004.29 available for carrying forward to the next year.

[396] [Section] 191 COMPANIES INCLUDED IN GROUP OF COMPANIES]

191(1) [Determination of group of companies] For the purposes of this section –

(c) The proportion of the paid-up capital, and of the nominal value of the allotted shares, and of the voting power, and of the title to profits held by any person in any company at the end of any income year shall be determined by the Commissioner; and

(i) In determining those proportions, the Commissioner shall disregard any alteration in those proportions which, in his opinion, is of a temporary nature and has or purports to have the purpose or effect of in any way –

The single issue in this case was whether the transfer of all (36,250) of the ordinary shares in the company from RSC (except for 1 share) to the objector (purchaser) on 14 February 1980 was of a 'temporary' nature. The issue of the preference shares on 14 February 1980 was designed to fulfil the 40 per cent common ownership requirement of s 188[397] regarding the carry forward of losses.

This in many respects reflects an aspect of the Russell template in that the vendors of the profit company could repurchase the assets of the company at a later stage, or re-enter the template arrangement. The agreement also had similarities[398] to tax loss agreements being entered into prior to this time, including the *Challenge* case[399], and as already noted these types of agreements to 'split' the tax benefits were being approved by Inland Revenue at the time.

The agreement contained various clauses,[400] including preventing the purchaser from selling the shares in the loss company without the consent of the vendors. It also required the purchaser to transfer the shares to the vendors, between three and ten years after the date of the agreement;[401] and contained a clause stating that the vendors and purchaser covenant that *all enquiries* regarding this transaction, or with each other, or with the Inland Revenue Department, be channelled through Mr Russell's company, Commercial Management Ltd.

---

[397] [Section] 188 (7) ITA 1976 [Requirements to satisfy] 'Subject to subsections (9) and (9A) of this section, if any taxpayer (hereinafter referred to in this section as the loss company), being a company having the liability of its members limited to its memorandum of association to the amount, if any, unpaid on the shares respectively held by them, claims, in accordance with subsection (2) of this section, to carry forward the whole or part of a loss incurred by it in any income year (hereinafter in this subsection referred to as the year of loss), to any later income year, the claim shall not be allowed unless the Commissioner is satisfied that –

(a) At all times during the period commencing with the beginning of that year of loss and ending with the end of that later income year, shares in the loss company carrying between them –
(i) The right to exercise not less than 40 per cent of the voting power in the loss company; and
(ii) The right to receive not less than 40 per cent of the profits that may be distributed by the loss company; and
(iii) The right to receive not less than 40 per cent of any distribution of the paid-up capital of the loss company, -

Were held directly, or through any one or more interposed companies, by or on behalf of the same persons…..'

[398] Clause 3 of the 1980 agreement provided that 'the purchase price of the said shares shall be the sum of one dollar ($1.00) provided that should at any time the Purchaser receive a definitive tax assessment which includes therein tax benefits accruing as a result of the Purchaser holding the said shares then the Purchaser *will forthwith pay to the Vendors one half of such tax benefit* by way of increase to the purchase price hereunder…' (emphasis added).

[399] *Challenge Corporation Ltd v Commissioner of Inland Revenue*, above n 49; *Commissioner of Inland Revenue v Challenge Corporation Ltd*, above n 49; *Commissioner of Inland Revenue v Challenge Corporation Ltd*, above n 24.

[400] The restriction contained in Clause 6 of the 1980 agreement was to ensure that no one 'unfriendly' to RSC would be able to use the name of the company. John Russell said at 4 of *Case L85*, above n 382 that *"I was a mate that rescued him"* (RSC) and that he (JGR) would have done what was right and proper in the circumstances. It was put to Mr Russell in cross examination that the effect of clause 6 of the 1980 agreement was to have the objector purchase the ordinary shares in the company for three years to enable the objector to use the tax losses of the company, and that the shares in the company were then transferred back to RSC via JGR. John Russell stated that RSC was "a layman and all this legal stuff was not his cup of tea".

[401] This clause was removed in 1982 by an amending agreement (and revoked other clauses as the 1980 agreement did not correctly express the intentions of the parties and it was desired the 1980 agreement be rectified accordingly).

[redacted][402][redacted]

The Commissioner in disregarding the alteration of the shareholding, thus disallowing a deduction for the losses, contended that the transfer was of a temporary nature and, had the effect of altering the incidence of income tax, and therefore should be disallowed under s 191(1)(c)(i) ITA 1976.

Mr Ruffin, for the respondent, submitted the only issue was the transfer of shares and that the transfer was of a temporary nature and that it was a matter of fact and degree for Judge Barber to decide. Section 99 ITA 1976 was not relied upon but reference was made to the *Challenge* judgments including the Privy Council case. Mr Ruffin submitted that the temporary nature aspect must be considered against a background of tax avoidance. This then raised the question of what was the meaning of the phrase 'of a temporary nature' contained in s 191(1)(c)(i) ITA 1976. There was no authority for the meaning of the phrase 'of a temporary nature' in s 191(1)(c)(i) so Mr Ruffin referred Judge Barber to a number of passages from the 1985 Federal Court of Australia decision in *Hazfa v Director-General of Social Security*[403] to assist. Although *Hazfa* dealt with an entirely different issue, the views of Wilcox J on the meaning of the word 'temporary' were helpful.

In terms of s 191(1)(c)(i) ITA 1976, the Commissioner was entitled to disregard an alteration in the shareholding of a company, if that change was of a temporary nature and involved tax avoidance. Judge Barber held that the holding of shares for three years may, more often than not, be regarded as a fairly permanent acquisition of shares. However, against the background of the purpose of utilising tax losses and steering the matters through Inland Revenue or objecting through the TRA or High Court, a period of three years is a relatively short period. In the context of this case and of the purpose of tax avoidance by utilisation of the losses of another company in terms of s 191 the three to 10 year period qualified as 'of a temporary nature' under s 191(1)(c)(i) ITA 1976.

Judge Barber, in confirming the assessment, stated that he did not accept that, "…there was nothing temporary regarding the shareholding…"[404] and that clause 6 of the agreement spoke for itself. Judge Barber considered in the context of this case that a period of three to 10 years qualified as "of a temporary nature" under s 191(1)(c)(i) ITA 1976.

---

[402] See Chapter VIII 'Settlement at last...not quite!' for a discussion on the *Kemp* litigation.

[403] *Re Maya Hazfa v Director-General of Social Security* [1985] FCA 164, (1985) 6 FCR 444. This case considered the meaning of "usual place of residence" and what constitutes a "temporary" absence in relation to the Social Security Act 1947.

[404] *Case L85*, above n 382.

Mr Russell was the only witness for this case and he accepted that tax avoidance had taken place intentionally. *Case L85*[405] would have been one of the first cases that Judge Barber would have heard with a connection to Mr Russell and his associated litigation. The beginning of the storm was brewing with few realising what lay ahead.

[405] *Case L85*, above n 382.

E The First Template Cases – Case M104[406] *and* Case M109[407]

> "*I agree with Mr Grierson's submission that the transaction was 'commercially ingenious', but I reject his submission that it was 'commercially realistic'*"[408]

The template cases concerned income tax years from 1980 onwards. Mr Russell stated that the purpose of the template was "nothing to do with tax".[409] It was to get some money for the debenture holder. The first template case, *Case M104*[410] was reported on 23 August 1990. What is perhaps not commonly known is that the template, although initially a creation of Mr Russell, was actually considered for its merits by a lawyer prior to its use.

[redacted][411]

[redacted][412]

[redacted][413]

F Fiorucci Fashions Ltd and the Miller and O'Neil Litigation

The focus of this thesis is placed on the Miller and O'Neil template *Case R25*[414] and the commerciality reasons for the Millers and O'Neil's entering into the tax template arrangement. This thesis will consider in some detail the facts of the template case that ultimately was decided in the

[406] *Case M104*, above n 315.

[407] *Case M109*, above n 248.

[408] *Case M109*, at 5 per Judge Barber.

[409] Interview with Mr JG Russell, above n 1.

[410] *Case M104*, above n 315.

[411] [redacted]

[412] Interview with Mr JG Russell, above n 1.

[413] [redacted]

[414] *Case R25*, above n 48.

Privy Council, *O'Neil v Commissioner of Inland Revenue*.[415] As the template is essentially the same in most of the Russell template cases[416] presented before the Courts it is considered that a detailed explanation of the *Miller and O'Neil* decisions is appropriate for this thesis.[417]

In essence the template involves shares in a profitable company being sold at an inflated price through a complex maze of corporate structures to a loss-making shell company controlled by Mr Russell. The owners of the profitable company remain as directors and trustees of their former company, running it as usual. **Appendix 5** of this thesis contains a complete set of redacted template documents.

Profits of the company are paid to Mr Russell's company as so-called administration charges. In reality, the administration charges were partly a conduit for the money to be returned to the original shareholders as instalments of the purchase price and fees paid to Mr Russell for running the scheme. When all the instalments were paid to the original shareholders tax free, they could buy back the company at a nominal price and carry on as if nothing had happened, or re-enter the scheme.

The core documentation and facts in *Case R25*[418] were similar to *Case M104*[419] and *Case M109.*[420] Judge Barber had found similar transactions to be void against the Commissioner in *Case M104* and *M109* because they constituted an arrangement in terms of s 99(1) ITA 1976. They were plans to avoid liability for income tax and were artificial, contrived, and not sensibly related to ordinary business dealings, nor did they amount to tax mitigation.[421] A primary purpose and effect of the arrangements in those cases was tax avoidance and the tax consequences could not possibly be described as merely incidental. The Commissioner succeeded in *Case M104* and *Case M109*; however, the 'cupboard was bare' when the Commissioner sought to enforce the assessments confirmed by Judge Barber's decision. In *Case M104* and *Case M109* the Commissioner had not reconstructed assessments under s 99(3) [Adjustment of income] to assess the shareholders of the 'profit company.' In *Case R25*, s 99(3) was applied and resulted in very substantial assessments[422] personally against the Millers and the O'Neil's.

---

[415] *O'Neil v Commissioner of Inland Revenue*, above n 2.

[416] There were minor variations to the template.

[417] [redacted]

[418] *Case R25*, above n 48.

[419] *Case M104*, above n 315 [redacted]

[420] *Case M109*, above n 248.

[421] Tax 'mitigation' was a term coined by Lord Templeman in *Commissioner of Inland Revenue v Challenge Corporation Ltd*, above n 24.

[422] An appendix in *Miller v Commissioner of Inland Revenue*, above n 142 displays the amounts initially allocated to Managed Fashions Ltd, Mr and Mrs Miller and Mr and Mrs O'Neil for the 1986 to 1989 income tax years. In later

1 The friendship with the Millers and O'Neil's

The Millers and O'Neil's and their business, Fiorucci Fashions Ltd (later named Managed Fashions Ltd) entered into the template arrangement with Mr Russell. [redacted][423] [redacted][424] [redacted][425] [redacted][426] [redacted][427]

litigation the percentage split to the husbands and wives was considered. Also contained in the appendix is the amount of administration charge disallowed as a deduction in terms of s 99 and /or s 104 ITA 1976.

[423] Interview with Mr JG Russell, above n 23.

[424] Interview with Mr JG Russell, above n 23.

[425] Interview with Mr JG Russell, above n 156.

[426] Mr Russell had involvement with many companies as a director, in addition to being a director of Securitibank. Some of the other companies were associated with the Securitibank business. [redacted]

[427] Interview with Mr JG Russell, above n 156.

[redacted][428]

[redacted]

[redacted][429]

[redacted]

[redacted][430]

[redacted][431]

[redacted]

[428] Interview with Mr JG Russell, above n 156.

[429] Interview with Mr JG Russell, above n 156.

[430] [redacted]

[431] Interview with Mr JG Russell, above n 156.

[redacted][432]
[redacted][433]
[redacted][434]

[redacted][435]

Mr Russell reflects that probably around 20 per cent of the companies bought by the Russell group of companies were risky businesses. But there were others that were not risky in the sense that they had been in profit and were not in any financial difficulty. He states:[436]

> …the people were happy with the arrangement…probably because it returned more money for them than what they would get if they kept owning the assets themselves…so I suppose to that extent you could say that probably the tax advantage was one of the main reasons they did it…[redacted]

[432] Interview with Mr JG Russell, above n 156.

[433] Interview with Mr JG Russell, above n 156.

[434] Interview with Mr JG Russell, above n 156.

[435] [redacted]

Interview with Mr JG Russell, above n 1.

[436] Interview with Mr JG Russell, above n 156.

[redacted]

[redacted][437][redacted]

[redacted][438][redacted]

[redacted][439][redacted]

[redacted][440][redacted]

[redacted][441][redacted] This was the end of the line for any further use of the Russell tax template. In *Case Z19*, the 'Track E' litigation, case, Judge Barber stated in his last sentence of the judgment that "In this case, the Commissioner could reasonably have imposed shortfall penalty of 150 per cent for tax evasion."[442]

[437] [redacted]

[438] Interview with Mr JG Russell, above n 1.

[439] [redacted] Personally Mr Russell favoured the continuation of the Privy Council link rather than a New Zealand Supreme Court, in part due to his feeling that a litigant like himself becomes known by all of the judiciary in New Zealand and the independence of the Privy Council appealed to him in this regard.

[440] [redacted]

[441] *O'Neil v Commissioner of Inland Revenue*, above n 2.

[442] *Case Z19* (2009) 24 NZTC 14,217 (NZTRA) at [284].

Chapter VII
Assessment

VII Assessment

A Adjusting the Assessable Income – 'Track A and B'

Mr Russell had conceived the idea of putting tax losses to use, employing s 188 of the ITA 1976 (ITA 1976), which permitted taxpayers to carry forward such losses and set them off against assessable income in a later year, and s 191 of the ITA 1976 which allowed for grouping of the accounts of related companies.

Mr Russell devised what he termed a 'business structure' for corporate reorganisation. It has been used since 1980 in essentially the same form and was described in the course of argument as a 'template'. The planned economic result was that the 'water' of income, which but for the 'business structure' would have been taxable to the profitable company and conceivably again if any dividend were paid to its shareholders, would be converted into the 'wine' of untaxed capital receipts in the shareholders hands, subject to a 5 per cent 'consultancy fee' paid to a Russell company, and an 'administration charge'.

[redacted][443]

[redacted]

[redacted]

[redacted]

[443] [redacted]

In the early stages[444] of attempting to deal with the Russell template tax schemes, the Commissioner appeared to have concentrated upon the tax saving afforded to the trading company by the disappearance of its profits in the form of administration fees. The Commissioner made assessments on the basis that the administration fees paid would not have been allowable deductions. This form of assessment was called 'Track A'. Although there were quite a few 'Track A' cases, only two of them went to court being Ron West Motors (Otahuhu) Ltd and K J Cummings Ltd (*Cases M104* and *M109* respectively).[445]

During the 'Track A' litigation Inland Revenue perceived that collecting the tax would be a problem. Mr Russell considered that "if they were assessing the money they made a mistake in the first place choosing the company."[446] Mr Russell acknowledges that s 99(3) ITA 1976 counteracts a tax advantage derived from an arrangement, stating that "the only person you can assess is the person that got the tax advantage,"[447] and in his mind it was quite clear that the tax advantage in the Russell template was in the parent company. Mr Russell considered Inland Revenue should have assessed the parent company, which they did under 'Track C', but later abandoned it because they could not make it work.

1 'Track A' – A 'pyrrhic' victory

The 'Track A' assessment route was in reality a 'pyrrhic victory'. This description was first coined by Blanchard J in the judicial review *Miller v Commissioner of Inland Revenue*[448] where his Honour summarised the background by reference to *Case M104* and *Case M109*. His Honour stated:[449]

> The Commissioner's victories before the Taxation Review Authority in *Cases M104* and *M109* have proved to be pyrrhic. This is because the Commissioner chose in those cases to attack the schemes by assessing the trading companies on the basis of disallowing consulting fees paid to Mr Russell's partnership and the administration fees paid to the parent company. When this was upheld by the Authority, it produced taxable profits in the trading companies but, of course, the moneys themselves had long since gone elsewhere and the Commissioner

[444] [redacted]

[445] *Case M104*, above n 315 and *Case M109*, above n 248.

[446] Interview with Mr JG Russell, above n 156.

[447] Interview with Mr JG Russell, above n 156.

[448] *Miller v Commissioner of Inland Revenue* (1993) 15 NZTC 10,187 (HC).

[449] At 7.

> found himself with judgments against empty shells. For this reason when seeking to attack the arrangements put in place by Mr Russell for the present plaintiffs the Commissioner changed his approach. In his amended assessments *he is using s 99 in a different manner*.

[redacted][450]

This suggestion prompted a meeting in Auckland on 7 February 1990 where the minutes of the meeting record:[451]

> …it is the original shareholders who get the CASH. Currently our approach is to disallow that deduction of 'Administration fees' paid to the alleged Parent Loss Company under s 104 – also using s 9.
>
> There would seem to be considerable advantage – especially in the recovery area, in trying to assess the cash received by the original shareholders using s 4.
>
> I will endeavour to obtain a legal opinion on this matter by 1 March.

In *Miller v Commissioner of Inland Revenue*,[452] Baragwanath J agreed with Mr Ruffin (legal counsel for the Commissioner) that the administration charge was "simply a device to siphon the company's surplus out of the company so that there would be no assessable income to the company."[453] Further he saw it as 'perfectly clear' that the charge was fixed to increase overheads to match the gross profit of a similar figure to result in a nil profit/loss. His Honour saw no conclusion available except that the administration fee was payable in exchange for the use of the template, not for gaining assessable income but for avoiding tax. Mr Russell states that, in relation to *Case M109*, Inland Revenue received payment in full of all tax owing.[454]

2 'Track B' – Miller *and* O'Neil

In early 1990 it was apparent that Inland Revenue realised they were losing the tax collection 'battle' and were proactively preparing to tackle Mr Russell head on. This is evidenced in several Inland Revenue file notes and internal memorandums written at the time. Recovery of tax was becoming an issue. A memorandum dated 12 February 1990, which recorded an important meeting of 7 February 1990 noted:[455]

---

[450] [redacted]

[451] At 35.

[452] *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,219 (HC).

[453] At 13,235.

[454] Interview with Mr JG Russell, above n 1.

[455] *Miller v Commissioner of Inland Revenue*, above n 142, at 80.

> One of the problems to be faced in (sic) that some of the companies sheltering profits have now run their course. In these cases, some companies have sold their assets (and liabilities) back to the original shareholders – leaving the company as a mere shell. Recovery of any taxes now imposed will be a problem and we may decide to give these cases low priority.

Another memorandum of 20 February 1990 recorded the remarks made by Mr Player, to another tax inspector: [456]

> He said he is concerned that a lot of the Russell companies will sell back the business to the original shareholders and become dormant shells with no assets that we cannot recover tax from. This would mean even if we were in Court we do not recover any tax. *Our problem is primarily a recovery one*. (emphasis added).

Some 22 years later, in 2012, Inland Revenue's 'problem' remains one of tax collection, as well as one of ultimately wanting to be held as 'being right'.

On 11 May 1990 an internal Inland Revenue memorandum headed, 'Review of JG Russell Schemes', referred to a team of five inspectors controlled by Mr Player (a small team of investigators prior to the instigation of the 'Russell Team') awaiting the TRA decision concerning 'Track A' saying:[457]

> [we are] losing the …asset less shell. New approach [is] being considered.
>
> This is that s 99 be applied to the WHOLE scheme and the persons who receive the cash advantage i.e. the original shareholders of the 'Profit' company, be assessed with the rearranged income from the scheme.

On 24 May 1990, Inland Revenue received a series of file notes prepared by Dyer & Co. Chartered Accountants which purported to contain the record of a discussion with Mr Russell. [redacted] The file notes included the following passage: [458]

> On 7.2.89 following the meeting the AY, BAHM met with JRG (sic) to query matters relating to the tax structure to assist BAHM to decide whether to continue the arrangements or not. The following was discussed.

---

[456] At 80.

[457] *Miller v Commissioner of Inland Revenue*, above n 142, at 80 & 36.

[458] AY is an abbreviation for Arthur Young. BAHM is an abbreviation for the shareholders in Applied Beverages Ltd – Beuth, Abrahams, Haskayne and Mason. This material was admitted in the interim judgment of Baragwanath J. *Miller v Commissioner of Inland Revenue*, above n 142, at 80. Mr Russell challenged the admissibility and accuracy of this material. Baragwanath J admitted it as it was relevant to the issue of the Commissioner's motivation: *Miller v Commissioner of Inland Revenue*, above n 142, at 81.

> Question: (BAHM) If the IRD rejects the arrangements and comes back for tax what is BAHM's liability?
>
> Answer: (JRG) (sic) IRD go for the company not the individuals. IRD give warning of investigation (warning bells) – *assets would be shifted from BMM [Booth Manufacturing and Marketing Ltd] to another company*. (emphasis added).
>
> Action would be against company with no assets – and JRG (sic) says he would win if one was brought against CML [Commercial Management Ltd] as owners.

A record of a meeting held on 30 May 1990 referred to a belief of asset stripping, something which had previously only been suspected. It would appear the Dyer and Co. file note perhaps only confirmed the suspicions that may have been held by Inland Revenue investigations staff. A report dated 11 July 1990 indicated that a new approach was needed. The report recorded:[459]

> *Inherent recovery issues built into the scheme by Russell at the outset* but not appreciated in its essence until stage of potential hearing [before the] Taxation Review Authority. (emphasis added).

On 11 July 1990 the Assistant Controller of Investigations, Wellington, Ms Phillipa Foulds, wrote a memorandum stating:[460]

> Assessments issued to date under the Russell Project have been pursuant to section 104 and section 99 Income Tax Act 1976. Five of these cases are presently pending a hearing before the Taxation Review Authority. It is suggested that the technical approach be altered so that a reconstruction under s 99 has the effect of assessing the individual shareholders for the total income and to refer to s 65(2)(a) and /or s 65(2)(1) as back up.

Ms Foulds was concerned about legal issues arising from the proposal that Inland Revenue adopt an alternative assessment approach and requested legal advice from Mr Alan Clarke,[461] an in-house Inland Revenue solicitor. Mr Clarke's opinion was provided on 10 September 1990, and following that report on 27 September 1990, another meeting was held where it was agreed that 'Track B' assessments would be imposed.

---

459 *Miller v Commissioner of Inland Revenue*, above n 142, at 81.

460 At 36.

461 The legal advice provided by Mr Clarke was challenged as to whether it was a privileged document. His Honour Baragwanath J held that in his view the opinion was to be characterised as prepared for the dominant purpose of giving legal advice rather than in performance of executive function. Mr Clarke had acted as a lawyer rather than as an official. *Miller v Commissioner of Inland Revenue*, above n 142, at 38.

3 Inland Revenue interview with the Millers and O'Neil's

The Bill of Rights Act 1990 (BORA) came into force on 28 August 1990. Section 27 of the BORA[462] is concerned with a person's right to justice, which in essence states that a person (including a taxpayer) is entitled to natural justice. One of the first cases to be considered under the then new BORA was in fact a tax related case *Knight v Barnett*.[463] In this case, somewhat embarrassingly for Inland Revenue, two obviously overly diligent investigations officers were held to have crossed the line into what was clearly unacceptable surveillance of a tax agent. Mr Russell recently raised the issue of natural justice in his application for judicial recusal during the 'Track E' litigation.

However, the first time Mr Russell referred to the BORA was shortly after it had become law. The Millers and O'Neil's were interviewed by Inland Revenue shortly after the BORA came into force. It was this interview that led Mr Russell to raise the BORA claim for the first time. By way of background an Inland Revenue investigations officer advised the Millers and O'Neil's that he was to carry out an audit on the affairs of Managed Fashions Ltd for the period 1 February 1984 to 9 August 1990 and sought to arrange an interview and requested records to be made available at the interview.

The start date for this period was no doubt chosen as the sale of the Fiorucci Fashions Ltd business was sold to Mr Russell's group on 10 December 1984.[464] The request was made in terms of ss 16 and 17 Inland Revenue Department Act 1974 (IRDA 1974).[465] An interview was confirmed for Monday 1 October 1990 at 10.00am to be held at the premises of Managed Fashions Ltd, in Dacre Street, Newton, in Auckland.

Managed Fashions Ltd was formerly Fiorucci Fashions Ltd, the original Miller and O'Neil clothing manufacturing company.

[462] Bill of Rights Act 1990 s 27 [Right to justice].

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[463] *Knight v Barnett* [1991] 2 NZLR 30 (CA).

[464] [redacted]

[465] Section 16 (Commissioner has power to inspect books and documents) and s 17 (Information to be furnished on request of Commissioner) Inland Revenue Department Act (IRDA) 1974.

[redacted] A sum equivalent to the tax saved was split between a company controlled by Mr Russell called Managed Hotels Ltd and the shareholders of the previously wholly unrelated profitable company Fiorucci Fashions Ltd, (later Managed Fashions Ltd), the Millers and the O'Neil's.[466]

The correspondence from Inland Revenue about the pending audit was passed on to Mr Russell and a letter from Mr Russell dated 27 August 1990 to the Investigations Officer stated that Managed Fashions Ltd "is now entirely administered in this office." Mr Foy, an Inland Revenue tax inspector, conducted the interview on 1 October 1990, just over a month after the enactment of the BORA. At the interview was the investigations officer, Mr and Mrs Miller, Mrs O'Neil (Brian O'Neil was away overseas) and Mr Russell.

Mr Foy was told that following the application of the Russell business structure they 'just carried on as usual.' The Millers and Mrs O'Neil stated that advice and services were received from Mr Russell in exchange for a five per cent consultancy fee. They also told Mr Foy that they had never heard of an entity associated with them as part of the template arrangement, Managed Hotels Ltd.[467] They said that the business structure was Mr Russell's idea for providing a capital gain. They also confirmed that nothing had changed in respect of the running of the business.

Mr Foy had 23 carefully planned 'intelligent questions' which formed the basis of the meeting. Various documents were also made available to him. The information gained during this interview, and pursuant to a s 17 notice requesting information, was later argued as either inadmissible or should not be accepted in *Case R25*.[468] Essentially Mr Grierson in *Case R25*, who was acting for the taxpayers, submitted that evidence obtained at the interview and pursuant to the notice of request was either inadmissible or should not be accepted by Judge Barber in terms of his wide discretion to admit evidence under the IRDA 1974. He relied on several sections of the BORA.[469]

---

[466] The agreement for sale and purchase of the Fiorucci Fashions Ltd shares between the Millers and O'Neil's as sellers and Commercial Management Ltd acting as trustee for Mr Russell's company Managed Hotels Ltd. Other entities, including Managed Hotels Ltd's holding company Gainsborough Motor Lodge Ltd (also controlled by Mr Russell) and Waikato Frozen Products Ltd, were employed to give effect to the arrangement.

[467] Mr Russell's company Commercial Management Ltd was acting as trustee for Managed Hotels Ltd in the arrangement.

[468] *Case R25*, above n 48.

[469] The following sections of the Bill of Rights Act 1990 were relied upon by Mr Grierson:
Section 6: Interpretation consistent with Bill of Rights to be preferred;
Section 21: Unreasonable search and seizure;
Section 23: Rights of persons arrested or detained;
Section 24: Rights of persons charged;
Section 27: Right to justice.

Inland Revenue had legitimately obtained information about Mr Russell's activities from the Justice Department, and although there were allegations the information was obtained in an illegal manner, it was found that the Inland Revenue officers had acted pursuant to s 17 of the IRDA 1974. Judge Barber did not see how the provisions of the BORA could assist Managed Fashions Ltd.

Upon analysis there had been no unreasonable search or seizure and the information upon which the assessments were based could have been ascertained in a number of ways.[470] There was no arrest or detainment. There was nothing irregular or improper about the meeting of 1 October 1990 or the notices requesting documents pursuant to the IRDA 1974 (now s 17 TAA 1994). Mr Russell was present at the interview and had been very involved in handling the responses to questions from Inland Revenue. Neither the Millers, O'Neil's or Managed Fashions Ltd had been charged with any offence and Judge Barber stated he was always scrupulous to observe the principles of natural justice irrespective of s 27 of the BORA.

None of the interviewed parties had been detained or arrested and there was no severe or overbearing nature to the questioning by officers of Inland Revenue. Mr Grierson seemed to submit that the Millers and O'Neil's should have had legal advice before or at the interview but clearly there was nothing to stop them obtaining such advice. Mr Grierson referred to the Millers and O'Neil's as "bewildered laymen being disadvantaged at such interview through sheer ignorance"[471] but in fact Mr Russell was present and it would appear he looked after the interests of the Millers and O'Neil's. Mr Russell was referred to by Judge Barber as being "certainly not an ignorant or bewildered lay person."[472]

It is apparent that Mr Russell keeps abreast of the law changes and current events from our conversations. Consideration of the impact (if any) of the BORA for his template client only months after it becoming law is evidence of this. In addition is Mr Russell's awareness of law changes both in relation to taxation, such as the changes to the tax loss offset provisions in the early 1990s.

Mr Miller told Mr Foy that he had been advised that it had been decided to issue assessments to the shareholders because the company [Fiorucci] was now just a 'shell'. He stated that both he and his wife considered it grossly unfair[473] and quite improper for Inland Revenue to assess them simply because it believed that they were more likely to pay some tax than the company. Further, Mr Miller said that they were aggrieved as it was his understanding that the Commissioner

---

[470] Section 21 BORA provides that: 'Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise'.

[471] *Case R25*, above n 48.

[472] At 35.

[473] Fairness/equity is one of the psychological factors in the BISEP Compliance Model. Perceptions of fairness are regarded as very important in relation to tax compliance. See B.R. Jackson and V.C. Milliron, above n 106; M. Richardson and A.J. Sawyer, above n 105.

was said to have had full knowledge of their affairs in 1984 and performed an investigation in 1985 which had not led to income being ascribed to them personally. Mr Foy wrote to Mr Russell (with copies to the Millers and O'Neil's) outlining the steps contemplated by Inland Revenue by way of the imposition of a 'Track B' assessment, and invited their comments within 14 days.

Both Mr Russell and Mr Miller replied by way of letters on 14 November 1990 making comment. It was said that the administration charges were not 'directly' or 'indirectly' received by the plaintiffs as managers; that they ended up in the hands of the parent company and that the consulting fees ended up in the hands of Mr Russell's partnership. The letters also contended that the payments made by the parent company were of a "capital nature being repayment of advances which were earlier made by the managers to the parent company." In addition Mr Russell's letter stated "in any event the actual cash payment ends up in the hands of our client company at the time of payment, so it is not correct to say that the funds end up in the hands of the managers. The actual cash ends up in the hands of the company."[474]

A reply to clarify the matter was received from the Commissioner dated 4 December 1990:[475]

> Yourselves and Mr Russell were involved in what you in your letter describe as a 'transaction' to which you were parties. The Department's proposed course of action involved treating such transaction, or rather the portions of it described in Mr Foy's letter, as void against the Commissioner and, after avoiding the steps cited, reconstructing the factual situation to counteract the tax advantage sought to be gained by that which is avoided. In this context, *the question as to what monies were actually received by you does not determine your tax position.*
>
> As to the assertion that the Department may be claiming against the wrong persons in light of previous judicial decisions relating to other cases, such is not well founded as in such cases powers of reconstruction provided by the Income Tax Act were not invoked, whereas in the present case such would be invoked. (emphasis added).

The letter summed up by saying that the proposal was to treat as void the elements of the 'transaction' entered into between the Millers and O'Neil's and Mr Russell described in Mr Foy's letter, and to reconstruct to counteract the tax advantage obtained by entry into the transaction.

---

[474] Mr Russell's letter cited in *Miller v Commissioner of Inland Revenue*, above n 142, at 83. Mr Russell finished this letter tongue in cheek with the comment: "However, having said all this it is apparent to us that it would be of great advantage to our client company and the parent company and to Commercial Management [Mr Russell's partnership] if you were in fact able to get the Courts to find that the managers are liable to pay tax on the income of these other parties. From our point of view that would be a highly desirable arrangement and would be to the great benefit of all those companies with which we are involved. We regard the future possibilities of such arrangements as highly desirable to us and look forward to your further progress in the matter."

[475] Letter of reply cited in *Miller v Commissioner of Inland Revenue*, above n 142, at 83.

A few days later on 13 December 1990 Mr Miller on behalf of himself, Mrs Miller and the O'Neil's replied to the Commissioners' letter of 4 December by stating inter alia:[476]

> Unfortunately your letter does not tell us how you intend to reconstruct a situation which will involve us receiving assessment for tax over and above what we have already been assessed for and paid. We need to have the actual details if we are to comment sensibly on them and would be grateful if you would set out step by step *how you propose to tax us on income which we did not receive*… (emphasis added).

In the meantime on 11 December 1990 Mr Foy had prepared his major report. According to Mr Russell Inland Revenue reversed quite a number of 'Track A' assessments and started again under the 'Track B' route. [redacted][477]

4 Changing tracks – is it permissible?

Mr Russell considers the changes of 'track' to assess various parties are all part of the alleged vendetta being run against him by Inland Revenue. [redacted]

An argument raised in support of 'Track B' was that Inland Revenue had a better understanding of the template as aspects were uncovered. Mr Russell claims that Inland Revenue had a good understanding of the full nature of the scheme right from the start. They were simply trying to change the assessee to someone they thought they would get the tax from. This would be surprising as a further change was yet to come – the least understood Track 'C' to be discussed shortly.

On 20 December 1990, an Inland Revenue solicitor, Ms Margaret Cotton, performed her analysis of the Millers and O'Neil's transaction and made a number of recommendations, first that reconstruction under s 99 be allowed; second, that the deduction for the administration charges be disallowed; and third, that the profit made by Fiorucci Fashions Ltd be assessed back to the Millers and the O'Neil's. On 8 March 1991, Mr Phizacklea, a senior office holder in the Legal Services

[476] Letter cited in *Miller v Commissioner of Inland Revenue*, above n 142, at 84. Wylie J faced a similar situation in *Russell v Commissioner of Inland Revenue*, above n 35 (the High Court 'Track E' litigation in 2010) where Mr Russell stated that he 'did not receive a dollar from the arrangement, either directly or indirectly.' See [140] to [149] of the judgment.

[477] Interview with Mr JG Russell, above n 156.

Division of Inland Revenue's Head Office, endorsed upon Ms Cotton's report approval to invoking s 99.

On 19 March 1991 Mr Player signed a direction that s 25 [Limitation of Time for Amendment of Assessment] was not to apply. On the same day he endorsed Mr Foy's 11 December 1990 report directing a reassessment of the Millers and O'Neil's income for the years 1986 to 1989 in terms of Mr Foy's report. Two days later, on 21 March 1991, Mr Player signed a series of letters to the Millers and O'Neil's giving notice of reassessment on the 'Track B' basis.

Mr Russell responded by way of letters on 15 and 18 April 1991 seeking substantial further information. On 15, 17 and 18 April 1991, he wrote giving notice of objection extending to 24 grounds and advising Inland Revenue that until further information was obtained, it was not possible to finalise objections. Mr Player from Inland Revenue's Auckland office responded to the requests for information by letters dated 7, 20 and 23 May 1991. The 23 May letter included a schedule showing how the reconstruction was performed.[478]

On 13 June 1991 Mr Foy wrote to Commercial Management in essence stating that, as further information sought earlier had been provided, Commercial Management should be in a position to supply full and final grounds of objection. Mr Foy also advised that ss 99(1) to 99(4) ITA 1976 would be applied and adjustments to Managed Hotels Ltd under s 99(4) would be made once a full review had been completed.[479]

Baragwanath J held in *Miller v Commissioner of Inland Revenue*[480] that in his view there was nothing in this or other material adduced which could be said to establish that the Commissioner was distracted from his proper task by an improper purpose. It was in fact the contrary. The evidence satisfied Baragwanath J that it was well open to the Commissioner to conclude that the business structure infringed s 99 and that it was therefore the Commissioner's duty to apply ss (3). He held that the Commissioner's staff knew that the provision of the template allowed a pre-planned comprehensive scheme to take effect which had the practical consequence of allowing the original directors/shareholders to continue to run the company and to receive the bulk of the net

[478] These letters were all referred to in *Miller v Commissioner of Inland Revenue*, above n 142, at 13,044.

[479] [redacted]
Mr Russell was granted 14 days to respond to the letter of 13 June 1991 and, after a lengthy letter of reply from Mr Russell, Mr Player wrote a letter dated 4 July 1991 spelling out in detail the basis on which the Commissioner was proceeding and affording a further 21 days for the formulation and submission of any further grounds of objection. By letter dated 12 July 1991 extending to five pages, Mr Player gave further particulars to Mr Russell of the Commissioner's basis of claim against the Millers and O'Neil's and afforded a further period of 14 days to submit any further final grounds of objection.

[480] *Miller v Commissioner of Inland Revenue*, above n 142, at 86.

profits of the business tax free. Furthermore Baragwanath J held that it was open to the Commissioner to conclude that the balance of *payments by way of an administration charge was a fee for the provision of the template and not for other services*. (emphasis added) [481]

The Miller's and O'Neil's had expressed at the earlier interviews that everything went on in the day to day running of the business as before. They were also in a position legally to reacquire the business by payment of a sum equivalent to the amount of the net liabilities plus $13,000, a right which was subsequently exercised.

Baragwanath J held that the Millers and O'Neil's *knew* that the transaction differed markedly from a conventional commercial transaction in the following respects:[482]

> Firstly, the transaction was planned to and did have the result of effecting no economic change in the position of the shareholders apart from the ultimate cost of repurchase of the $13,000 and in the meantime they were receiving the whole of the net profits tax free after payments to Companies B and C.
>
> Secondly, Company 'B' did not perform any 'administration'. Company 'B's receipt of the whole of the net profits of the business, out of which it made the tax free payments to the Millers and O'Neil's, was pursuant to the original arrangement.

Baragwanath J held that there was no element of improper purpose which would have constituted an abuse of power or would justify judicial intervention. His Honour stated that he did not doubt the Commissioner did seek to "go to where the money is";[483] equally the question of solvency was clearly not determinative, or his purpose dominated by such reason irrespective of any right to do so.

The true issue was not whether the question of solvency was important to the Commissioner, and a major motivating factor, as Baragwanath J had no doubt it was. The *real* issue was whether the Commissioner lacked honest and reasonable belief that he was entitled to assess the Millers and O'Neil's. Baragwanath J was satisfied that such was not the case and the Commissioner was fully entitled to elect to assess the plaintiffs and to rely on their receipt of substantial untaxed funds, and presumed ability to pay, in making that decision. The Commissioner's task is to recover tax according to the law, not to waste public funds in useless forays against impecunious alternative targets.

---

[481] At 86.

[482] At 87.

[483] At 88.

Baragwanath J was satisfied that the Commissioner's decision to shift from 'Track A' to 'Track B' was not simply because Fiorucci Fashions Ltd was insolvent. The true reason for the decision was that both Fiorucci Fashions Ltd and the Millers and the O'Neil's were seen by the Commissioner as having obtained a tax advantage. This conclusion was clearly open to the Commissioner to reach and it then became the Commissioner's responsibility to decide how the s 99(3) 'counteract' duty was to be performed. It was the Commissioner's view that *the impecuniosity of Company A was in fact an element of the arrangement*[484] and that was the precipitating cause of the shift from 'Track A' to 'Track B'.

In conclusion, Baragwanath J considered that the decision to counteract based on the greater financial capacity of the Millers and O'Neil's, was properly open to the Commissioner. It was not 'simply' because of their stronger financial position but, critically, because of that position *coupled with their tax advantage which it was the Commissioner's duty to counteract*.[485]

The Commissioner could not require double recovery by both the plaintiffs and Company A. Baragwanath J found it was well open to the Commissioner to prefer to make recovery against the party which received the economic benefit and against whom the expenditure of public funds by way of recovery would be more likely to be more effective. It was on this basis that Baragwanath J found no reason to invalidate the 'Track B' assessments raised against the former shareholders, the Millers and O'Neil's personally.

[484] At 89.

[485] At 89.

5 Reconstruction

Section 99(3) ITA 1976 (now s GA 1(2) ITA 2007) provides the Commissioner with the power to adjust the taxable income of a person affected by the arrangement in a way he/she thinks is appropriate in order to counteract a tax advantage obtained from or under the arrangement. [redacted][486]

The conceptual underpinning is that the arrangement in question is void as against the Commissioner. The adjustment can be made against anyone benefiting from the tax avoidance arrangement, there is no question of mutuality being needed, nor does the taxpayer need to be aware they are benefiting from or under a tax avoidance arrangement. The adjustment must counteract the tax advantage, which is not defined for the purposes of s GA 1 ITA 2007. The appropriateness of the Commissioner's reconstruction was challenged in *Miller v Commissioner of Inland Revenue.*[487] When the 'cupboard was found bare' by pursuing 'Track A', the Commissioner changed to assessing under 'Track B'. The issue was whether this changed approach was a suitable application of the reconstruction power of s 99(3) ITA 1976.

It was argued by Inland Revenue that the company's history demonstrated a low level of salaries and distributions from the company and that it was most likely that, had there been no arrangement, the profit would have remained within the profitable company. The Court of Appeal addressed this issue as follows:[488]

> We consider that the likelihood of receipt of moneys by the former shareholders must be judged by what they have actually done. They have caused all the profits to be removed from the company. It must therefore be taken that *these sums would have been distributed in the form of additional salaries, management bonuses, dividends or in some other manner in the years in which they were earned by Fiorucci and would not have been left in the company*. The desire of the shareholders to extract them is demonstrated by what they actually did. *They were unlikely to have waited 10 years to get their hands on each instalment of earnings.* It is not to be taken, either, that because a tax free means exists to receive moneys, their receipt by another means is to be deemed to be tax free. Furthermore, although part of the tax would otherwise have been borne by the company in the form of company tax, it is not to be forgotten that an element of the arrangement was the stripping from it of its assets out of which it could otherwise have met that tax burden. In such a case those who had a responsibility for that course of action and who have themselves put it beyond the power of the company to pay its

[486] [redacted]

[487] *Miller v Commissioner of Inland Revenue* [1999] 1 NZLR 275 (CA).

[488] At 32.

> tax and received the money themselves, have thereby indirectly received the tax advantage. Section 99(3) gives the Commissioner a wide reconstructive power. He 'may' have regard to the income which the person he is assessing would have or might be expected to have or would in all likelihood have received but for the scheme, but the Commissioner is not inhibited from looking at the matter broadly and making an assessment on the basis of the benefit directly or indirectly received by the taxpayer in question.

On appeal to the Privy Council in *O'Neil v Commissioner of Inland Revenue*[489] the taxpayer's argument was dismissed saying at [31]:

> …provided that he was not using inconsistent hypotheses for his reconstructions, he was in their Lordships' opinion entitled to assess any party who had obtained a tax advantage.

Appendix 6 contains a letter demonstrating typical administration and management fees for a Russell template client. The original reconstruction of Managed Fashions Ltd, Millers and O'Neil's is in **Appendix 7** of this thesis. This reconstruction was later challenged by the taxpayers on the basis that a larger number of shares were held by Mr Miller and Mr O'Neil than held by their respective wives.

[489] *O'Neil v Commissioner of Inland Revenue*, above n 2.

B Assessing the Parent Company 'Track C'

"…we can assess the parent companies because the whole thing is a sham…"[490]

The least understood assessment 'tracks', and perhaps the most difficult to follow, are the 'Track C' assessments. The basis of the 'Track C' assessments was that the Commissioner could assess the parent companies because "the whole thing was a sham."[491] 'Track C' is based on that concept.[492] Lennard[493] writes that "nothing is more calculated to raise the temperature of a tax dispute than an allegation of sham, tossed by the Commissioner like a handful of chillies into the slowly cooking stew of a tax dispute." The success of such allegations has been mixed and well below the Commissioner's usual success rate in the courts.

A finding of sham is clearly fact dependent. In a New Zealand context there have been very few reported tax cases holding that a sham exists.[494] When examining the tax treatment of a transaction the first step is to ascertain the transaction's true nature. In *Re Securitibank (No. 2)*[495] it was said the true nature of a transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out. Before any issue of sham arises, it is important that a systematic and objective approach is undertaken to ascertain the true nature of the transaction. Richardson J in *Re Securitibank (No. 2)* provides guidance in this context.[496]

---

[490] Interview with Mr JG Russell, above n 156.

[491] For more on the meaning of 'sham' refer to *IRD Tax Information Bulletin* (TIB) Volume 9, No.11 (November 1997) at 7.

[492] In *Snook v London West Riding Investments Ltd* [1967] 2 QB 786 (CA) at 802, Diplock LJ said that 'sham' means "acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities…that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

[493] Michael Lennard, "Wham Bam, It's a Sham" [2007] Taxation Today 1. In Lennard's view, it is bad public administration, and hence bad tax administration to make an accusal of sham on insufficient grounds. It is an inherently destructive act and should not be undertaken by the State in a casual or unfounded way. The vast majority of transactions are genuine and a court will be extremely reluctant to find sham unless it has been clearly proven by the Commissioner. Any plausible innocent explanation would probably be preferred. Lennard concludes that although the allegation of sham is a tempting one for the Commissioner to make, a sham allegation with insufficient enquiry would be bad tax administration and lead to litigation which the Commissioner would be unlikely to win.

[494] A relatively recent win on sham was in the Actonz Management Ltd case, *Erris Promotions Ltd v Commissioner of Inland Revenue* (2003) 21 NZTC 18,330 (HC) where it was established on the basis of overwhelming evidence that some of the 'software' allegedly bought either did not exist or was not owned by the purported vendor, and that these facts were known to all parties. The Commissioner has not succeeded in sham allegations in *Peterson v Commissioner of Inland Revenue*, above n 176; *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2007] NZCA 346, [2008] 1 NZLR 222 and *Accent Management Ltd v Commissioner of Inland Revenue* [2007], above n 136.

[495] *Re Securitibank Ltd (No.2)* [1978] 2 NZLR 136 (CA).

[496] 'Sham – meaning of the term', above n 491.

The assessments based on the doctrine of sham were ultimately withdrawn by Inland Revenue, although the time it took to do so appears to be quite excessive. Mr Russell stated "we were never able to work out what 'Track C' truly did…because we were never allowed to cross examine the architect of it."[497] Mr Russell considered that this particular argument "didn't have feathers to fly with in the first place",[498] and it never got tested because the 'Track' was ultimately withdrawn. There were about one hundred 'Track C' assessments actually issued by the Commissioner; however, none of these assessments were paid.

It was in September 1996 when the Commissioner embarked on the new assessment process originally called 'Track C.' [redacted][499] [redacted]

Mr Russell stated that the 'Track C' process was "unintelligible and neither the Commissioner's officers who were giving evidence or the taxpayers fully understood what was happening."[500] In fact, even now, Mr Russell said that he does not know for sure what the 'Track C' assessment process was all about. Interestingly, *Case U23*[501] demonstrates the confusion that existed around this particular 'Track'. Judge Barber writes:[502]

> It seems to me that there has been confusion over this so called Track C assessment approach to date because, when referring to it, witnesses and/or counsel have not necessarily been talking about the same thing. It seemed to me that even different witnesses for the respondent [IRD] had a different definition of Track C.

Judge Barber continued:[503]

> However, by the end of the hearing before me, there did not seem to be dispute between counsel that Track C covers the administration charge, which has already been assessed to the

[497] Interview with Mr JG Russell, above n 156.

[498] [redacted]

[499] [redacted]

[500] Interview with Mr JG Russell, above n 156.

[501] *Case U23* (1999) 19 NZTC 9,208 (NZTRA) was a continuation of interim decision *Case T52*, above n 349.

[502] *Case U23*, above n 501, at [18].

[503] At [18].

managers of the trading company, now assessed as sham income to Mr Russell's parent company together with all expenses disallowed to that parent company.

[redacted]

When examining the tax treatment of a transaction, the first step is to ascertain the transaction's true nature.[504] Before any issue of sham arises, it is important that a systematic and objective approach is undertaken to ascertain the true nature. For the Commissioner to make an allegation of sham the true nature would have to be objectively determined. [redacted]

1 FB Duvall – A supply of services and [redacted][505]

The tax template litigation has been described as an "indisputably tortuous saga,"[506] and the FB Duvall litigation that forms part of the template story, in particular with respect to 'Track C', is apt to also fit that description. In fact, the FB Duvall litigation has perhaps been the most difficult to

[504] *Buckley & Young v Commissioner of Inland Revenue* [1978] 2 NZLR 485 (CA); (1978) 3 NZTC 61,271 (CA). This is to be done in a systematic and objective way, so that there is no pre-judgment or "…sinister desire to impute to transactions something which they do not contain."

[505] [redacted]

[506] *Managed Hotels Ltd v Commissioner of Inland Revenue* (2011) 25 NZTC 20,090 (HC) at [6].

articulate in this thesis and provides insight into the procedural tax challenges that can arise in tax disputes. The plaintiffs in this litigation were all 'parent' companies in terms of the Russell template receiving payments made under the Russell template (as administration charges) for management services. Little is known about FB Duvall Ltd from a balance sheet perspective, although in the 1998 case, *FB Duvall Ltd (No 2)*[507] an affidavit was referred to sworn by Mr O'Dea[508] that mentioned that $1.8 million of its assets were stripped from it and that it was insolvent.

Initially in the FB Duvall Ltd *Case Q34*[509] it was held that payments made under the Russell template (the administration charge) for management services were liable for GST,[510] that the payments were not dividends (and accordingly not exempt from GST), and that earlier findings of the TRA[511] in respect of income tax issues and the application of s 99 ITA 1976 [s BG 1 ITA 2007] did not affect the outcome in respect of GST issues.

The GST periods in question in *Case Q34*[512] were from 31 August 1987 to 30 June 1990. This is a common denominator with the Russell related litigation, where some of the income tax years in question date back over 20 years. [redacted]

The judgment for the 'Track A' *Case M104*[513] was delivered on 23 August 1990 with judgment for *Case M109*[514] delivered on 4 September 1990. Judge Barber had made an observation in this regard in *Case M104* stating:

> I observe that it seems appropriate that the receipts to MD Ltd from the objector be deemed dividends, and that the respondent has wide powers of reconstruction under s 99.

It was following receipt of the first 'Track A' decisions[515] in relation to the income tax assessments that Mr Russell, on behalf of FB Duvall Ltd, began to assert that the Commissioner should take a consistent approach in relation to the GST assessments. Essentially what Mr Russell said was that if the Commissioner was contending in an income tax context that no services had been provided by the plaintiff companies, then it necessarily followed that no services had been provided by those

[507] *FB Duvall Ltd v Commissioner of Inland Revenue* (1998) 18 NZTC 13,943 (HC).

[508] Mr O'Dea, a member of the Russell Team.

[509] *Case Q34* (1993) 15 NZTC 5,159 (NZTRA).

[510] *Case Q34*, above n 509. Judge Willy held that the payments were not dividends, and accordingly not exempt from GST.

[511] *Case M104*, above n 315 and *Case M109*, above n 248.

[512] *Case Q34*, above n 509.

[513] *Case M104*, above n 315.

[514] *Case M109*, above n 248.

[515] *Case M104*, above n 315 and *Case M109*, above n 248.

companies and that they had therefore wrongly been charged (and paid) output tax in relation to the fees they had received in that respect.

Mr Russell considered the facts of *Case Q34* to be indistinguishable to the facts in *Case M104* and *M109*, consistent that the cases all were 'template' cases, in nature of similar structure. It was suggested GST already paid in prior periods would therefore be refundable.[516]

In correspondence presented in *Case M104* and *M109* earlier, Mr Russell wrote that "the management fee is not a dividend, it is an invoiced fee on which goods and services tax has been paid and as far as we are aware no goods and services tax is applicable to dividends."[517] Further correspondence from Mr Russell in 1989 stated in relation to the administration charge "obviously the parent company is not going to provide administration services for nothing."[518]

Case Q34 did not address income tax avoidance, and consequently neither s 99 ITA 1976 nor its equivalent s 76 GSTA was in any way relevant. Although it has been very difficult to establish with any accuracy the number of companies (and individuals) involved in the template, *Case Q34* refers to a comment made by Mr Russell where he states that the [template documents] are "standard in all cases within the group of some hundreds of affected companies."[519]

There were assertions made in *Case Q34* that the evidence of Mr Russell had differed from that presented earlier in *Case M104* and *Case M109* where services were stated as being provided, and in *Case Q34*, where it was stated that it never supplied any goods or services to the subsidiary companies with his Honour stating "he simply cannot have it both ways (particularly as he has appealed against the findings in *Case M104* and *M109*)."[520] Judge Willy held that the administration payment was made for services rendered by the parent company to the subsidiary and therefore cannot be a dividend but liable for GST.

Judge Willy stated:[521]

> It is clear from the way Mr Russell approached the case that he finds such a conclusion repugnant to justice, and common sense. He takes the view that this court has already

[516] Both Inland Revenue and Mr Russell agreed that the amounts of money at stake were very large and although no precise figure was available counsel for the Commissioner estimated it would run into several millions of dollars.

[517] Letter from Mr JG Russell to the Commissioner, (8 September 1988).

[518] Letter from Mr JG Russell to the Commissioner, (25 April 1989).

[519] *Case Q34*, above n 509, at 3.

[520] At 10. In lodging an appeal to *Case M104*, above n 315 and *Case M109*, above n 248 his Honour Judge Willy thought that this would have indicated that the objector companies did not accept that the payments are in law dividends, or that the transactions were not caught by s 99 ITA 1976.

[521] *Case Q34*, above n 509, at 12-13.

> characterised these payments as dividends, and that therefore they cannot be subject to GST. That overlooks the fact that this case turns on its own facts … the witness only has himself to blame for making such glaringly inconsistent statements about the same facts on different occasions. The conclusion is inescapable that he is merely trying to place upon those facts the construction that best favours his interests from time to time.

Although it may have appeared only Mr Russell was presenting things to suit him, the 'round two' honours would certainly be awarded to Inland Revenue, as will be discussed shortly.

To provide a little background, between April 1993[522] and July 1997, the Commissioner undertook detailed investigations in respect of the affairs of FB Duvall Ltd, with the Commissioner subsequently forming the view and making the concession that no services had been provided by FB Duvall Ltd in return for the fee and that FB Duvall Ltd in fact had no taxable activity. [523]

In the High Court,[524] Baragwanath J was of the view that this concession enabled or required the Court to look afresh at the assessments at issue and to take into account what he considered to be the logical corollary of the Commissioner's concession, namely that FB Duvall Ltd was not entitled to claim any input tax credits either. Following the High Court judgment the Commissioner made zero assessments which, while deducting the wrongly imposed output tax, also rejected FB Duvall Ltd's claim for input tax credits. That outcome was challenged by the taxpayer, but the High Court held in two further judgments[525] that both output tax and input tax deductions should be reduced to zero in each period.

That decision was overturned by the Court of Appeal[526] on the grounds that, although it was open to the Commissioner to concede the appeal, the reasons for his doing so could not be interrogated by the Court. More particularly, the Court of Appeal held that in litigation involving an objection to an assessment the Commissioner was not entitled to depart from (reverse) the legal and/or factual position that underlay the assessment, which in this case was that FB Duvall Ltd *was* engaged in a taxable activity. The Court said that all the Commissioner could do was issue fresh assessments

---

[522] The judgment in *Case Q34*, above n 509 was delivered on 29 April 1993.

[523] *FB Duvall Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,053 (HC).

[524] There were seven interim judgments issued by Baragwanath J in relation to the FB Duvall Ltd appeal, including; *FB Duvall Ltd v Commissioner of Inland Revenue* (1997) 18 NZTC 13,470 (HC); *FB Duvall Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,039 (HC) and *FB Duvall Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,515 (HC).

[525] *FB Duvall Ltd v CIR* (1999) 19 NZTC 15,039 (HC); *FB Duvall Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,515 (HC).

[526] *FB Duvall Ltd v Commissioner of Inland Revenue* (2000) 19 NZTC 15,658 (HC).

which reflected his changed position, provided the statutory time bar did not prevent him from doing so.[527]

The net result as far as FB Duvall Ltd was concerned, was that the Commissioner, as a result of his concession of the appeal, was obliged to refund the output tax paid for the GST periods at issue in the litigation.[528] It would appear, that the Commissioner was unable to claw back the input tax refunded to FB Duvall Ltd.[529] Following the Court of Appeal decision, FB Duvall Ltd asked the Commissioner to make amended GST assessments in accordance with the Court of Appeal judgment. The Commissioner failed to do so.

FB Duvall Ltd asked that its request be referred to the TRA.[530] The TRA held that it had jurisdiction to remedy any shortcomings regarding the assessments, including curing any procedural defects. It considered the Commissioner was obliged to reassess in accordance with the earlier decision of the Court of Appeal and that FB Duvall Ltd was accordingly not liable for output tax, but that there was no jurisdictional basis to embark upon a consideration of whether FB Duvall Ltd was entitled to corresponding input tax credits.

At the request of the Commissioner, the TRA stated a case to the High Court.[531] Priestley J allowed the Commissioner's appeal and held that the TRA had no jurisdiction in respect of the case stated where there had been no disallowance of an objection, the TRA having no entitlement to discharge the Commissioner's statutory responsibility to exercise his discretion. His Honour held that the

---

527 In broad terms the time bar contained in s 108 and 108A TAA 1994 prohibits the Commissioner from issuing reassessments that increase a taxpayers' income tax as GST liability after the expiry of four years. There is an exception for fraud and wilfully misleading returns.

528 GST periods between 31 August 1987 and 31 August 1990, inclusive.

529 Because of the length of time that had elapsed since the original assessments and because the amount of output tax exceeded the input tax, it was not open to the Commissioner subsequently to issue fresh assessments that disallowed the input tax credits. To have done so would have involved increasing FB Duvall's GST liability for the relevant periods in breach of the statutory time bar. The time bar (formerly in s 31 of the Goods and Services Tax Act 1985 and now contained in s 108A TAA 1994) provided that the Commissioner may not amend an assessment so as to increase the amount assessed if four years have passed from the end of the relevant taxable period. The time bar issue that arose as a consequence of the way in which the Court of Appeal framed its orders in *FB Duvall* would not have arisen if the Commissioner dealt with the output and input tax issues at the same time. If the two amounts were set-off against each other the overall amount of the assessments would have decreased rather than increased.

530 The Commissioner stated a case on 20 February 2001, but as a preliminary issue claimed that Duvall was unable to request a case to be stated, as the objection, if any, made by Duvall had not yet been determined by the Commissioner. Questions for determination in the case stated included the following:

a) Whether Duvall had made timely and competent objections to the assessments made by the Commissioner;
b) If not, whether Duvall was able to make a late objection to the periods in question;
c) Whether Duvall, in the absence of a determination regarding the alleged objections, was able to request a case stated.

The TRA directed these jurisdictional questions to be the subject of a preliminary hearing, following which it made an interim decision *Case V18* (2002) 20 NZTC 10,207 (NZTRA) and a final decision *Case W25* (2003) 21 NZTC 11,251 (NZTRA).

531 *Commissioner of Inland Revenue v FB Duvall Ltd* (2005) 22 NZTC 19,142 (HC).

Commissioner could not be compelled to accept a late objection; nor did the Commissioner have a statutory duty to reassess prior to accepting a late objection.

FB Duvall Ltd then appealed to the Court of Appeal.[532] In dismissing the appeal, the Court observed that where an objection is late, it must first be accepted by the Commissioner. If so accepted, the objection must be considered by the Commissioner before a decision is made by him, either to allow or disallow it. If the decision is to disallow the objection or to allow it only in part, then the taxpayer may require the Commissioner to state a case.

In addition, the Court of Appeal noted that the Commissioner is not bound by time limits when considering whether to allow or disallow a late objection, stating that the taxpayer is not deprived of remedy when unreasonable delay occurs. Judicial review would have been the proper course to follow if FB Duvall Ltd considered the delay to have been unreasonable. The Commissioner wrote to FB Duvall Ltd on two occasions advising that he had declined to accept the objections as timely.[533]

(a) The 'tortuous saga' continues

The 'tortuous saga' has continued well into 2011. The plaintiffs all sought judicial review of the Commissioner's refusal to accept late objections[534] from them in relation to GST assessments made in the early 1990's.[535] [redacted][536]

Mr Russell contended that the Commissioner was obliged to take the same approach to the GST assessments issued to other companies that were in the same position as FB Duvall Ltd. Mr Russell took this position not only on the basis that the Commissioner has a statutory duty to treat taxpayers

[532] *FB Duvall Ltd v Commissioner of Inland Revenue* (2006) 22 NZTC 19,866 (CA).

[533] Letter from Inland Revenue to FB Duvall Ltd (31 May 2005). The Commissioner wrote to FB Duvall Ltd advising that he had declined to accept as timely FB Duvall's objections based on amended GST returns for the six month periods ended 30 June 1995 and 31 December 1996. On 5 May 2006, shortly after the *FB Duvall Ltd v Commissioner of Inland Revenue* above n 532 decision, the Commissioner again wrote to Duvall advising that he had declined to accept as timely, Duvall's late objections in respect of eight six month GST periods ended between 31 May 1990 and 31 December 1994.

[534] There was no dispute that the time for objecting to assessments by Mr Russell was well past. This was the case even in 1993. The reason for the initial delay was that until the Commissioner had taken the tax position that the template transactions were tax avoidance arrangements that were void for income tax purposes, the issues in the Duvall litigation did not arise. The Commissioner regarded Mr Russell's correspondence on these matters as constituting requests that the Commissioner accept a late objection under the relevant provision at the time s 33(2) of the Goods and Services Tax Act 1985. The Commissioner refused to accede to the requests and declined to revisit the earlier (original) assessments. The reasons that were historically given for this refusal were the lateness of Mr Russell's requests and the need to await the conclusion of the FB Duvall litigation.

[535] There was a separate cause of action about delays by the Commissioner in making reconstruction adjustments that are consequential on his tax avoidance assessments issued to other Russell entities under s 99(4) ITA 1976.

[536] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52.

fairly under s 6 TAA 1994, but also because the Commissioner must necessarily (given his concession in FB Duvall Ltd), consider this is the 'correct' tax position.[537]

(b) Affidavit discrepancy

[redacted]

An application by Managed Hotels Ltd (another 'parent' company) seeking interim orders declaring that the Commissioner take no steps to enforce a statutory demand pending resolution of judicial review proceedings, was heard earlier[538] before Ellis J. Her Honour referred to an affidavit[539] of Mr Strang dated 23 March 2009 where it was stated that the Commissioner "stands by" his original assessments (which were based on Mr Russell's returns). Her Honour stated that in light of his [Commissioner's] position in the *Duvall* litigation it seemed improbable that the Commissioner considered that Managed Hotels Ltd was providing services or engaging in a taxable activity.

Her Honour considered the Commissioner faced something of a conundrum in that he did not consider the present assessments (the assessments that form the basis of the statutory demand) were correct but he was unwilling or unable to reassess in the way sought by Mr Russell because either:[540]

(a) he was prevented by way of time bar from issuing reassessments that also require repayment by Managed Hotels Ltd of the input tax refunds it had received; or

(b) in the event that any input tax received by Managed Hotels Ltd was less than the output tax paid the Commissioner did not wish to pay a refund to Managed Hotels Ltd.

A further affidavit from Mr Strang referred to various items of correspondence prior to the concession made by the Commissioner in the High Court *Duvall* proceedings[541] but then made statements with regard to 'Track C'. The decision was made in August 1996 to reassess the parent companies on the basis of sham. The 'Track C' assessments were confusing to all parties with Inland Revenue staff having a different idea as to what the assessments actually were assessing. Her

[537] The Commissioner has the statutory power to amend assessments at any time (subject to compliance with any relevant procedural requirements, including the time bar) to ensure their correctness. This power was previously contained in s 27 of the Goods and Services Tax Act 1985, and is now contained in s 113 TAA 1994.

[538] *Managed Hotels Ltd v Commissioner of Inland Revenue*, above n 506. The hearing was 30 August 2011 with the judgment delivered on 19 October 2011.

[539] At [13].

[540] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52, at [13].

[541] Mr Strang annexed nine substantial volumes of correspondence between the Commissioner and Mr Russell in relation to the various plaintiff companies.

Honour considered that what Mr Strang's affidavit seemed to be suggesting was that, as a result of the Commissioner withdrawing income tax assessments (issued to other Russell entities) that were based on the contention that the template transactions were shams, the Commissioner had reconsidered whether his concession in the High Court was correct.

Her Honour found these passages from Mr Strang's affidavit "somewhat mystifying." Why her Honour considered it so is because the Commissioner nonetheless continues to regard the transactions as (income) tax avoidance arrangements and (accordingly) has always been of the view that the administration fee served no purpose other than as a cog in the tax avoidance "machine."[542]

Her Honour considered that it was quite plain that any possible relationship between the 'Track C' income tax assessments and the Commissioner's refusal to consider late GST objections was "news" to Mr Russell.[543] Such a relationship could not have been a factor in the Commissioner's earlier refusals because they preceded the 'Track C' assessments.

It was for this reason that her Honour requested documentary evidence from the Commissioner that would show that the Commissioner had reconsidered the matter and made a fresh decision on that basis, and if so that the decision had been communicated to Mr Russell. This request brought to the Court's attention three critical letters. There were two critical letters from Inland Revenue to Mr Russell in respect of the relationship between 'Track C' and the provision of services for GST purposes.

In November 2008 Inland Revenue had said: [544]

> …In summary, the purported link between track C and GST is not accepted by the Commissioner and *the two matters are considered to be quite separate*. (emphasis added)

In other words, in 2008 the Commissioner was taking a position diametrically opposed to that hinted by Mr Strang in his 23 March 2009 affidavit. The letter then addressed the Commissioner's concession in *FB Duvall* in the High Court as a "procedural error"[545] and this did not accord with the reality of the matter in her Honour's view.[546]

---

[542] The Court of Appeal in *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 526, noted at 15,662 that Baragwanath J held that no services were supplied by FB Duvall in return for the administration charges.

[543] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52, at [18].

[544] At [20]. Letter from Inland Revenue to John Russell (19 November 2008).

[545] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52, at [22].

[546] Her Honour stated that while it seemed clear that both the Commissioner and the High Court were procedurally mistaken as to the ambit of the High Court's powers, that mistake had nothing to do with the merits of the underlying concession and to suggest otherwise was merely 'cute.'

The Inland Revenue letter then stated in what could be considered a somewhat condescending tone:[547]

> You make the point that you do not understand how a factual matter can give differing results under GST as opposed to the income tax regime. Primarily this is possible due to the differing nature of GST when compared to income tax. Both are governed by differing legislation which will affect the way that legislation applies to the same set of facts. In addition, GST is a tax on supply whereas income tax is, as the name says, a tax on income, meaning different tax concepts apply and which may result in differing tax consequences.

Her Honour considered the proposition of the qualitative difference between GST and income tax. The question was whether or not the Commissioner, having determined for income tax purposes that no services are supplied in return for payment for the administration fee, can nonetheless assess for GST on the basis that the fee is paid in return for a supply of services.

Inland Revenue legal counsel, Mr Ruffin, submitted that such a stance was not contradictory because there was a contractual obligation to make the payment and the existence of that obligation was sufficient to found a GST "supply". Mr Ruffin referred her Honour to the High Court decision *Rotorua Regional Airport Ltd v Commissioner of Inland Revenue*,[548] which in her Honour's view supported an opposite conclusion.[549]

Ellis J considered in respect of the *FB Duvall Ltd* case that:[550]

> ...the Commissioner's position in the income tax litigation and the Court decisions all make it clear that, even if there is a contractual obligation to pay, no service is in fact "supplied" by the parent company in return for the administration fee. Money is being moved around for income tax purposes, that is all.

---

[547] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52, at [22].

[548] *Rotorua Regional Airport Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 23,979 (HC).

[549] Mallon J in *Rotorua Regional Airport Ltd v Commissioner of Inland Revenue*, above n 548, at [50] considered the established propositions as to the scope of s 8(1) GST Act 1985 [[Imposition of goods and services tax on supply]. His Honour considered the following:

(a) 'GST is levied in respect of "supplies", therefore it is a tax on transactions rather than receipts or turnover;
(b) GST is charged on the supply of a good or service. Whilst services are broadly defined to mean anything which is not goods or money, to be a service there must be a "thing" to be within the statutory word of "anything";
(c) Although the consideration need not be paid by the recipient of the services, there must be a nexus between the consideration on which the GST impost will arise and the supply of goods or services; and
(d) The nomenclature used by the parties is not decisive, nor are the economic or other consequences. What is crucial is the ascertainment of the legal rights and duties which are actually created by the transaction into which the parties entered.'

[550] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52, at [26].

While Baragwanath J in *Miller* said that the fee was payable "in exchange for the use of Mr Russell's template", that was not a "supply" made by the parent company. It has never been suggested that the sale of a tax avoidance product might constitute the relevant taxable supply.[551] The Inland Revenue letter then reiterated that there was no relationship between the sham allegation made in the income tax context and the GST issue.[552]

Mr Russell, in response[553] stated perhaps rather provocatively that given that no attempt had ever been made by Inland Revenue to reassess the input tax, it could be assumed that the Commissioner had no issue with it and merely thought that the output tax should be refunded, in accordance with the concession. Mr Russell further stated that whether or not the administration charge was taxable was essentially a factual matter to which differences between the income tax and GST regimes was irrelevant.

Mr Russell's letter sought confirmation as to whether he was correct to now understand that the Commissioner:[554]

> …now claims that there is output tax on the administration charge? It is true that he took that position before the TRA in the Duvall case but it was his own idea to reverse that position for the High Court. The reason he reversed his position was because after commencing the objection process for Duvall he came up with track C, which was a further change of mind from the track B assessment process and he could not then continue to claim in Duvall that there was output tax payable when he was alleging sham in the track C assessment process.

Mr Russell's letter then asked:[555]

> …would you please state precisely what the Commissioner's now position is in respect of the administration charge for both the Goods and Services Tax regime and the income tax regime.

Inland Revenue responded by reiterating the Commissioner's position that there was no link between the 'Track C' (sham) income tax assessments and the GST treatment of the administration fee. Inland Revenue also stated that the *Duvall* litigation turned upon a "unique procedural fact", rather than any statement of "general principle", and that the fact that the administration fee had

---

[551] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52, at [26], footnote 19 where Ellis J referred to Baragwanath J's comments in *Miller v Commissioner of Inland Revenue*, above n 452, at 13, 235. Similarly, the Court of Appeal in *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 526 noted at 15, 662 that it had been held that no services were supplied by Duvall in return for the administration charges.

[552] Letter from Inland Revenue to John Russell, above n 544, stated:' It is not accepted…that "…all parties now agree that the administration charged (sic) does not attract output tax in the GST regime".

[553] Letter from Mr JG Russell to Inland Revenue (February 2009).

[554] Letter from Mr JG Russell to Inland Revenue (February 2009).

[555] Letter from Mr JG Russell to Inland Revenue (February 2009).

formed part of an arrangement that was void for income tax purposes did not "automatically" dictate the GST position. Her Honour expressed her views as to the invalidity of the last two points above and made comment that the first point was contrary to Mr Strang's affidavit.

Mr Ruffin could point to no correspondence[556] where Mr Russell was told about what must have been a subsequent 'about face' by the Commissioner or any document in which his fundamental change in position has been analysed or explained. This clearly must add to the tremendous frustration Mr Russell must feel at times when dealing with Inland Revenue.

Her Honour held that the plaintiff's judicial review application in relation to the late GST objections must proceed. Ellis J stated that it 'is well-established that the merits of a proposed objection must be considered unless the explanation for the lateness is so inadequate as to render that unnecessary'.[557] Her Honour accepted that a considerable length of time had elapsed since the making of the assessments in question but considered the explanation for the delay could not fairly be regarded as inadequate.

Ellis J thought it highly relevant that Mr Russell had first raised the issue of the proposed objections 15 years ago, the merits of the proposed objections were linked with the outcome of the on-going *Duvall* litigation and it was the Commissioner who suggested that any decision on the late objections should await the conclusion of that litigation, and since the conclusion of the *Duvall* litigation Mr Russell has repeatedly and consistently renewed his request.

Her Honour stated that once it is concluded that the explanation for the delay is adequate, the narrative shows quite clearly that either the Commissioner failed to turn his mind to the merits of the proposed objection or to the extent that he had done so, his assessment of the merits is seriously flawed. Her Honour in that respect considered that:[558]

> it is not possible to conclude that administration services were supplied by the parent companies for GST purposes in the face of the Commissioner's position (which has been endorsed by the Courts) in the income tax cases. *The fact that there may be differences between the GST and income tax regimes is immaterial*, (emphasis added).

Her Honour also considered the withdrawal of the 'Track C' (sham) income tax assessments did not constitute a valid basis for revisiting the substance of the concession given that the Commissioner continues to regard the Russell template as void for income tax purposes and the administration fee as merely a profit transfer mechanism. Her Honour made the point that the

---

[556] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52, at [31].

[557] *Commissioner of Inland Revenue v Wilson* (1996) 17 NZTC 12,512 (CA) at 12,521; *Lawton v Commissioner of Inland Revenue* [2003] 2 NZLR 48 (CA) at [29].

[558] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52, at [34].

suggestion that the Commissioner has revisited the matter on that basis flies in the face of his repeated and vehement assertions to the contrary that have been made to Mr Russell. Ultimately her Honour ordered that the Commissioner reconsider his decision[559] to refuse to accept late objections from the plaintiff companies, with the plaintiffs succeeding in the review.

[redacted] Ellis J reserved leave for Mr Russell to bring the matter back before the Court if progress was not made.[560]

Based on a sworn affidavit by Mr Graham Player on 29 May 1998, it would have been easy to conclude that the 'services' issue was decided. Mr Player had expressed the view that:[561]

> [c]ertainly after *Case Q34* was decided on 29 April 1993, the Commissioner had sufficient 'institutional knowledge' to decide whether o[r] not there were services performed.

[redacted][562] So in summary, the FB Duvall litigation has been extensive, covering many procedural matters.[563] It has spanned four decades covering tax periods from 1987, initially litigated in the TRA in 1993 and was still being litigated in 2011 with matters outstanding.[564] [redacted]

---

[559] In *Chesterfield Preschools Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23,148 (HC), the "second" judicial review proceeding, Fogarty J granted the taxpayers' application for judicial review and directed the Commissioner to reconsider matters in accordance with the High Court's judgment and directions of December 2006 in the "first" judicial review proceeding in *Chesterfield Preschools Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,125 (HC). Fogarty J was of the view that although the Commissioner had not deliberately disobeyed the Court's directions, it was arguable that the Commissioner had "ignored" those directions. The taxpayers were entitled to costs.

[560] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52, at [37].

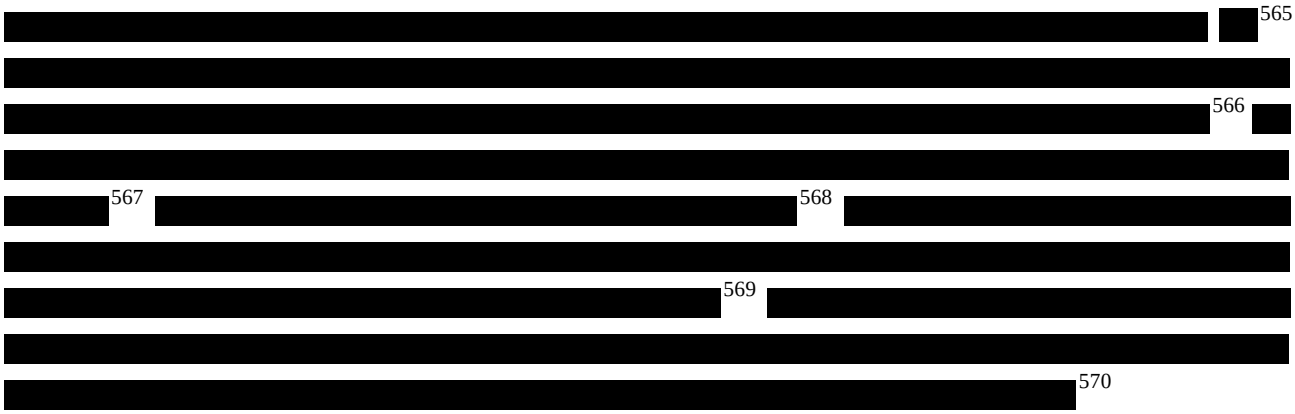
[561] Mr Player's affidavit referred to in *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 507, at 12.

[562] [redacted]

[563] There have been many procedural issues in the FB Duvall litigation, by way of example in *FB Duvall Ltd v Commissioner of Inland Revenue)*, above n 507 the High Court held that there was no reason why the Commissioner cannot himself, as the creditor of one person (where tax is owing) give notice to himself as the debtor of another person (where a tax refund is due). There have been jurisdictional issues, whether FB Duvall had entitlement to relief under the Contractual Mistakes Act 1977, issues of unjust enrichment and the applicability of the statute time bar in s 108A [Time bar for assessment of GST].

[564] The lengthy time frame until resolution is only surpassed by the 1985 and 1986 income tax assessments of Mr Russell under the Track 'E' assessment route.

C Assessing 'Track D'



The 'Track D' assessments were dealt with by the TRA on a preliminary hearing as to their validity. Mr Russell considered that as a matter of procedure the assessments were entirely invalid on two counts. First, the person who had invoked s 99, as part of the Commissioner's delegated authority and who had the power to issue s 99 assessments was not the person who actually issued them. Consequently, under the Commissioner's delegated authority, the assessments were a legal nullity. Secondly, most if not all of the assessments were statute barred and the person who made the declaration to set aside the statute bar did not have the delegated authority to do so. Mr Russell considered that as a consequence of this, even if the assessments had been valid by virtue of the s 99 authority, they would have been invalid because the statute bar plainly applied.

---

[565] In *Case U23*, above n 501, at [64] it was confirmed that there was no reason to depart from the fee rate of $250.00 per hour (arrived at in *Case R25)*, above n 48 for Mr Russell providing general business advice to two trading companies. Accordingly, in *Case U23* the consultancy fee was deductible for a total, between the two companies, of 15 hours per month at $250.00 per hour. The witness in *Case U23* at [63] stated that the trading companies received "considerable advice" constantly from Mr Russell which they found very useful and during a time of great development in the electronics industry. However, he seemed unable to quantify the number of hours per month over which Mr Russell gave business advice as distinct from advice regarding the template scheme. He emphasised that he had found Mr Russell's general management advice very valuable and that he thought the 5 per cent consultancy fee was modest. He maintained that nearly all such advice related to the running of the businesses and that the accountant for their companies dealt with the template aspects with Mr Russell. He said that, generally, Mr Russell was responding to communications about a business problem. The witness referred to one such meeting involving Mr Russell driving to Tauranga from Auckland and immediately meeting with two brothers (the business owners) for five hours.

[570] Section 99 (4) [Deemed derivation of income] ITA 1976 provides that "Where any income is included in the assessable income of any person pursuant to subsection (3) [Adjustment to income] of this section, then, for the purposes of this Act, that income shall be deemed to have been derived by that person and *shall be deemed not to have been derived by any other person*." (emphasis added)

[redacted]

[redacted][1] [redacted]

[redacted][2]

[1] *Russell v Commissioner of Inland Revenue*, above n 52: Mr Russell was refused leave to appeal to the Supreme Court. *Russell v Commissioner of Inland Revenue*, above n 32.

[2] Interview with Mr J G Russell, above n 1.

D 'Track E' – Assessing Mr Russell personally

> *"I never got personally a single dollar of the income that they assessed to me…and I am saying you can't avoid tax or get a tax advantage if you never got any of it at all…"*[573]

'Track E',[574] which has been the subject of more recent litigation, attempts to tax all income derived by the Commercial Management Partnerships to Mr Russell personally.[575] [redacted][576] Before considering the legal merits argued in 'Track E', it is essential to gain at least an overview of the money flows from the template income. This is contained in **Appendix 8** of this thesis headed 'Understanding the Mechanics of 'Track E'. **Appendix 9** provides a summary of various loss entities and loss partnerships in relation to 'Track E'.

Wylie J, in the High Court, described the factual matrix as being of "labyrinthine complexity". There were 289 folders of documents before the TRA containing thousands of pages of information.[577]

The total income returned by Mr Russell from 1985 to 2000 was $298,700.76.[578] The Commissioner took the view that the total income returned, but for the avoidance arrangements, should have been $15,757,556.18 – a difference of $15,458,855.42. He sought to recover use of money interest (UOMI) and shortfall penalties for taking an abusive tax position for the 1998, 1999 and 2000 years pursuant to s 141D TAA 1994.[579]

---

[573] Interview with Mr JG Russell, above n 23.

[574] [redacted]

[575] [redacted]

[576] Telephone interview with Mr JG Russell, above n 562.

[577] *Russell v Commissioner of Inland Revenue*, above n 35, at [7].

[578] The Commissioner did not seek to reassess income for the years 1978 to 1984. He reassessed Mr Russell's personal income for the years ended 31 March 1985 to 31 March 1996 under s 99(3) ITA 1976 and for the years 1997 to 2000, under s GB1 ITA 1994.

[579] Section 141D TAA 1994 imposes a shortfall penalty on a taxpayer taking an "abusive tax position" in the taking of a taxpayer's tax position, with application to tax obligations for periods commencing on or after 1 April 1997. The purpose of the abusive tax position shortfall penalty is to deter taxpayers from taking an unacceptable tax position and entering into arrangements or applying tax laws with a dominant purpose of the avoidance of tax. See Inland Revenue Interpretation Statement IS00061 'Shortfall Penalty for Taking an Abusive Tax Position'. Part 7 of TAA 1994 imposes Use of Money Interest on unpaid tax. Use of Money Interest came into effect in 1998.

Mr Russell unsuccessfully challenged these assessments in a 64 day hearing[580] in the TRA[581] and appealed to the High Court.[582] Mr Russell appeared on his own behalf in the TRA as he has done in a lot of the later litigation, perhaps due to him being very able in the court room and also for cost reasons.[583]

Mr Russell had unsuccessfully sought an adjournment of the hearing of the substantive High Court appeal. The 'Track E' matters were heard by Judge Barber in *Case Z19*,[584] and prior to its commencement Judge Barber was asked to recuse himself by Mr Russell. His Honour declined to do so and Mr Russell had applied for judicial review of that refusal. He had sought an interim order pursuant to s 8 of the Judicature Amendment Act 1972 staying the proceedings before the TRA pending the outcome of that application. The application for interim relief was refused by Keane J on 27 September 2005.[585] As a result, the proceedings before Judge Barber continued, even though the application for judicial review regarding the appropriateness of Judge Barber hearing the case had not been finally resolved.

A substantive judicial review application was heard by Cooper J between 31 March 2008 and 2 April 2008. His Honour gave judgment on 19 December 2008 dismissing Mr Russell's claim.[586] An appeal against that judgment was lodged on 5 February 2009. However, the hearing of the appeal was delayed. Wylie J understood that this was because the proceedings by Judge Barber were by then so far advanced that it made sense to wait for the TRA's determination before hearing the appeal on the disqualification issue.

The Commissioner, at Mr Russell's request, consented to a delay by Mr Russell in filing his case on appeal. Eventually the case on appeal was filed and in February 2010 the appeal was allocated the fixture date of 5 August 2010.

---

[580] This case was heard at Auckland over 64 days between 3 October 2005 and 30 April 2009. Mr Russell appeared on his own behalf and gave evidence. The Commissioner called evidence from a senior officer Mr Blakeley whose brief of evidence was 349 pages long. Cross-examination went into every aspect of the case in fine detail. The transcript of cross-examination of Mr Russell alone ran to almost 500 pages. The notes of evidence in total comprised some 2,455 pages. During the hearing the parties presented the Authority with an agreed statement of facts which in itself was a lengthy document of 123 pages.

[581] *Case Z19*, above n 442.

[582] *Russell v Commissioner of Inland Revenue*, above n 35.

[583] In 2005 Mr Russell stated that he had spent over $2 million in defending the template. In our interview in 2010 he stated that he had spent in excess of $5 million. [redacted] Interview with Mr JG Russell, above n 156.

[584] [redacted]

[585] *Russell v Taxation Review Authority* (2009) 24 NZTC 23,284 (HC) at [5].

[586] *Russell v Taxation Review Authority*, above n 585.

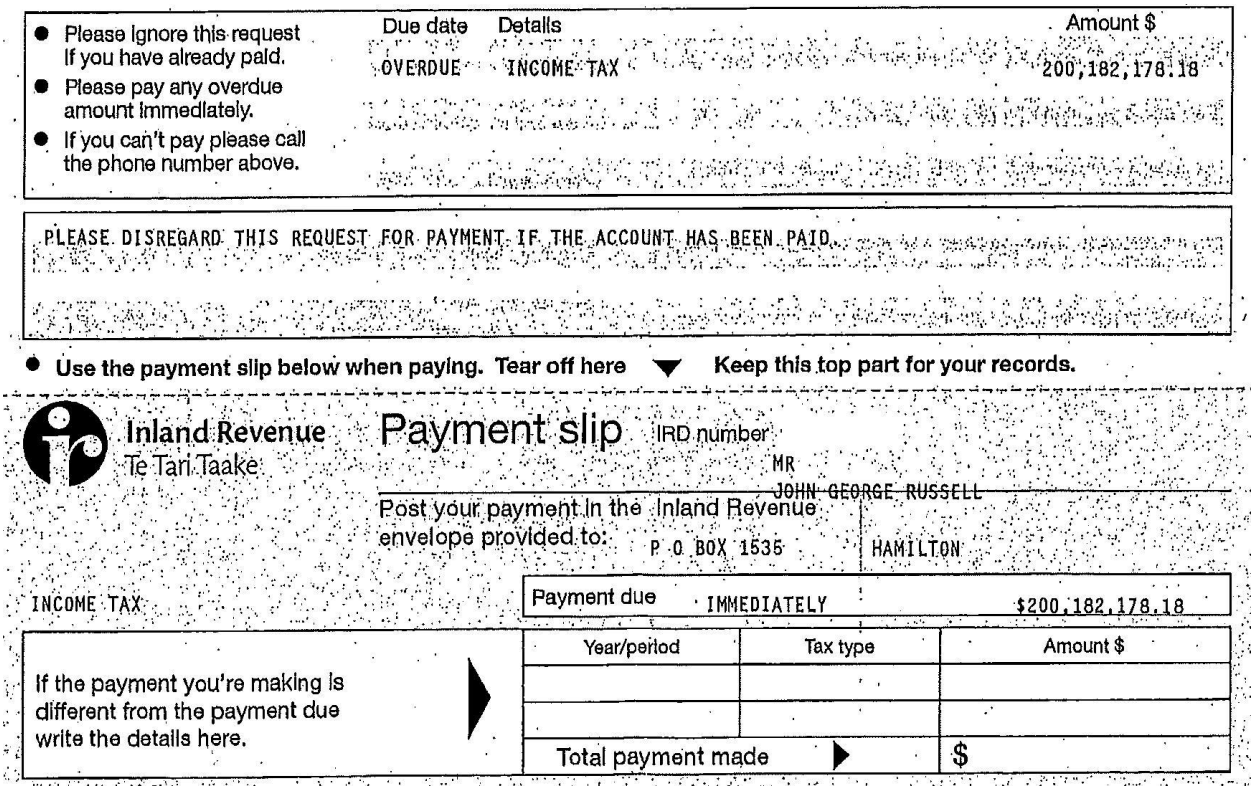
Figure 10: The 'Track E' litigation folders, Mr J G Russell's Garage, Kawakawa Bay, April 2010

1 High Court

The High Court substantive hearing was due to commence on 26 July 2010 with the Court of Appeal judicial review hearing listed for 5 August 2010. Mr Russell sought adjournment of the High Court appeal. However, it was held that it was not in the interests of justice to adjourn the hearing of the High Court substantive appeal as there was a considerable amount of tax at stake and, in Wylie J's view, it was in the wider public interest that the appeal be resolved as soon as reasonably practicable, as well as being in the best interests of Mr Russell. If an adjournment had been granted a delay would have been undesirable for both parties. Wylie J noted that the allegation of bias had been made before two Judges of the High Court and had been dismissed by both.

The amount at stake under 'Track E' as at April 2010, was NZD $138,796,819.38. This amount has been increasing daily due to use of money interest and late payment penalties. It currently (December 2012) exceeds $200 million.[587] Mr Russell's August 2012 Statement of Account for income tax years 1985 to 2000 is in **Appendix 10** of this thesis.

[587] The 1998 income tax year onwards demonstrates the monthly increase by way of incremental late payment penalty and Use of Money Interest.



- Please ignore this request if you have already paid.
- Please pay any overdue amount immediately.
- If you can't pay please call the phone number above.

Due date	Details	Amount $
OVERDUE	INCOME TAX	200,182,178.18

PLEASE DISREGARD THIS REQUEST FOR PAYMENT IF THE ACCOUNT HAS BEEN PAID.

- Use the payment slip below when paying. Tear off here ▼ Keep this top part for your records.

Inland Revenue
Te Tari Taake

Payment slip IRD number

MR
JOHN GEORGE RUSSELL

Post your payment in the Inland Revenue envelope provided to: P O BOX 1535 HAMILTON

INCOME TAX

Payment due IMMEDIATELY $200,182,178.18

If the payment you're making is different from the payment due write the details here.

Year/period	Tax type	Amount $
Total payment made ▶		$

In the Auckland High Court in 2010,[588] Mr Russell challenged the 'Track E' assessments claiming that he had "never received any benefit from the money." Wylie J, in a succinct decision, dealt with this aspect of Mr Russell's case saying that the definition of tax avoidance was broad enough to capture his activity. He was the 'main man' in charge of everything and had the ultimate control of the funds.

For the first time Mr Russell (via counsel) accepted that there were 'arrangements' for the purposes of s 99 ITA 1976 and its successor, between the Commercial Management partners and the various loss companies over the period. [redacted] Mr Russell was unable to personally attend the 'Track E' High Court case due to requiring back surgery at the time.

[588] *Russell v Commissioner of Inland Revenue*, above n 35.

Mr Russell did not contest that the arrangement by which the six Commercial Management partner companies (the 'agent companies') diverted their income to loss companies amounted to tax avoidance and that it was void as against the Commissioner. He did contest that his personal relationship with the companies as director was part of the tax avoidance arrangement. It was submitted that no tax was avoided as a result of the director/company relationship and that Mr Russell was not a party to *or affected by* the tax avoidance arrangements. It was also argued that each company was a separate legal entity,[589] and that there was no legal basis for lifting the corporate veil to assess income to Mr Russell as a director simply because he was a director.

When considering the scope of the arrangement in respect to Mr Russell, Wylie J stated that:[590]

> He personally promoted the Russell template; he could be contacted personally by clients; he supervised all staff employed by CML [Commercial Management Ltd]; he signed all correspondence; he signed all cheques; he signed all agreements on behalf of the partners; he was the receiver, liquidator or director of all loss companies; he corresponded on behalf of the partnership with the loss companies; he introduced new loss companies when needed.

In summary, Wylie J considered there was one overall arrangement over the years 1985 to 2000 (inclusive) stating:[591]

> It was put in place by Mr Russell. It comprised a convoluted series of interlocking contracts, agreements, understandings and plans. They are collectively evidenced and constituted the arrangement. There were changes to entities involved in the arrangement over the years. The partners in the Commercial Management Partnership changed. There were changes to the loss companies over the years. Indeed changes to the loss companies were inevitable. It was inherent in the model that new loss companies would be required from time to time as losses in the old loss companies were exhausted. *The fact that new entities were, from time to time, introduced to maintain the structure does not preclude there being one overall arrangement.* Regardless of the entities, the end result was that income was diverted into companies that had losses and those losses were utilised to avoid the payment of income tax on the income. The basic arrangement remained essentially unchanged for 15 years. This points to there being one overall arrangement.

Mr Russell's involvement in all that occurred was, in Wylie J's view, the most relevant factor in concluding there was one overall arrangement. His Honour considered Mr Russell as the 'lynchpin on which all turned', paraphrasing a description used by Lord Denning MR in *Wallersteiner v Moir*:[592]

---

[589] See *Salomon v Salomon & Co Ltd*, above n 197 and *Lee v Lees Air Farming Ltd*, above n 198.

[590] *Russell v Commissioner of Inland Revenue*, above n 35, at [96].

[591] At [99].

[592] *Wallersteiner v Moir* [1974] 1 WLR 991 (CA).

> [Mr Russell] controlled [the parties'] every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of him. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them.

Wylie J considered it beyond dispute that Mr Russell controlled everything and that he was the architect of the overall plan. Each of the parties to the arrangement, starting with Mr Russell and finishing with Mr Russell, had the expectation the other parties would act in a particular way, because all of their actions were orchestrated by him. In effect, Mr Russell provided consensus, although Wylie J doubted this being a necessary ingredient of any arrangement.[593]

The arrangement was not confined to the agreements between the partners and the loss companies as proposed by Mr Russell. Wylie J said this because the partners and the loss companies derived no benefit from the arrangement and took no independent role in the overall plan. They were functionaries that acted at Mr Russell's behest. The end result of the arrangement was Mr Russell deciding how untaxed monies he directed into the finance companies were to be utilised.[594]

Mr Russell claimed that he used legitimate corporate and trust structures with the judgments of the *Commissioner of Inland Revenue v Penny*[595] and *Penny v Commissioner of Inland Revenue*[596] referred to. The Commissioner was not challenging the legitimacy of the structures put in place by Mr Russell but was challenging the way those structures were applied.

Wylie J had reached the view that the arrangement put in place by Mr Russell was designed to ensure that income which Mr Russell earned through his personal exertions was diverted into a series of partnerships and companies controlled by him, and that no tax was paid on that income, with Mr Russell retaining control and directing how the untaxed monies were used. Wylie J accepted that Mr Russell may have preferred to trade through a corporate structure[597] to avoid any personal liability; however that was not the end of the matter. His Honour considered the

---

[593] An arrangement is defined to include a 'plan'. The use of the word 'plan' in contradistinction with the words 'contract and agreement', suggests that consensus is not a necessary ingredient. A plan can be devised and carried out by one person as was the case with Mr Russell and the template. In *BNZ Investments Ltd v Commissioner of Inland Revenue* (2000) 19 NZTC 15,732 at 15,787 held that a contract, plan or understanding required conscious involvement and that s BG 1 was confined to persons engaging in consensual activity towards an end (at 15,789). The majority in the Court of Appeal decision of *Commissioner of Inland Revenue v BNZ Investments Ltd*, above n 174 affirmed the High Court decision. The majority in the Privy Council decision *Peterson v Commissioner of Inland Revenue*, above n 176 held that a taxpayer does not need to be a party to an arrangement to be affected by it, while knowledge of the arrangement's details is also unnecessary.

[594] *Russell v Commissioner of Inland Revenue*, above n 35, at [102].

[595] *Commissioner of Inland Revenue v Penny & Hooper* [2010] NZCA 231, (2010) 24 NZTC 24,287 (CA).

[596] *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433.

[597] *Salomon v Salomon & Co Ltd*, above n 197.

arrangement as "so tortuous that it is hard to escape the conclusion that it was put in place simply to obfuscate the situation and to confuse even the most diligent tax inspector."[598]

With respect to Mr Russell and his numerous staff, Wylie J considered the evidence was clear that Mr Russell supervised all of the activities of the various employees. He reviewed all of their work and signed all correspondence including cheques. In his view, the fact that some or even much of the work was undertaken by employees did not materially affect the relationship between Mr Russell's personal exertions and the earning of the income of Commercial Management Partnership.

Referring to *Commissioner of Inland Revenue v Penny*[599], Wylie J addressed the issue of Mr Russell's salary. Mr Russell allocated a nominal salary to himself each year that did not bear any relationship to the work he undertook or to salaries properly payable in the marketplace. Very significantly, Mr Russell retained control of the whole of the income generated with only him being able to direct how it was to be applied. In Wylie J's view, the income of the Commercial Management Partnership was derived from Mr Russell's personal exertions and he had retained complete control over it.

Wylie J agreed with Judge Barber in the TRA that the steps taken by Mr Russell were not within the purpose or contemplation of Parliament[600] when it enacted the loss offset provisions contained in s 191 ITA 1976 and its successor sections. His Honour regarded the unrestricted transfer of profits to loss companies included in the group, purely because of the losses they brought with them, in the manner the template sought to achieve, would bypass the company grouping rules contained in the legislation and significantly undermine the tax base, which would not have been Parliament's intention.

Further, in Wylie J's view, the steps taken by Mr Russell, to divert the income which he generated by his personal exertions into the Commercial Management Partnership, were not within the contemplation of Parliament. Parliament had intended that individuals pay income tax at the appropriate rate on their net income. Wylie J referred to an obiter statement from *Spratt v Commissioner of Inland Revenue*[601] that:

---

[598] *Russell v Commissioner of Inland Revenue*, above n 35, at [118].

[599] *Commissioner of Inland Revenue v Penny & Hooper*, above n 595.

[600] The Supreme Court decision in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 47 now constitutes the definitive statement on the law of income tax avoidance in New Zealand. The taxpayer must satisfy the court that the component parts of the arrangement fall within the specific taxing provision, construed in light of its purpose, and are within Parliament's contemplation; and that the arrangement as a whole is within Parliament's contemplation. At [108] of the judgment the Supreme Court observed that "…a classic indicator of a use that is outside Parliamentary contemplation is the structuring of an arrangement so that the taxpayer gains the benefit of the specific provision in an artificial or contrived way. It is not within Parliament's purpose for specific provisions to be used in that manner."

[601] *Spratt v Commissioner of Inland Revenue* [1964] NZLR 272 (HC) at 274 per Henry J (obiter dictum).

> no taxpayer can, by way of assignment, escape assessment of tax on income resulting from his or her personal activity, and that such income always remains truly as income and is derived by him irrespective of the method he may adopt to dispose of it.

In conclusion, Wylie J considered that Mr Russell had structured the arrangement so that he gained a tax advantage in an artificial and contrived way. In his Honour's view, the purpose of the complex corporate structure was to divert income from Mr Russell's personal exertions, whether generated either directly through Mr Russell's activities, or indirectly through his control of employees, into companies, that were able to access the losses in the unrelated companies to avoid the payment of income tax.

At no stage did Mr Russell lose control of the monies. They could only be applied as he directed. The companies and other entities used were all ultimately controlled by Mr Russell. At no point was the income beyond his direct control. Ultimately Mr Russell, and other entities which he was interested in or controlled, benefited from advances made by the finance companies controlled by him.

Wylie J stated that the arrangement not only had the effect of altering the incidence of income tax, but that this was also its primary purpose. By virtue of s 99(3) ITA 1976 the Commissioner could adjust the assessable income of any person affected by the arrangement so as to counteract any tax advantage obtained. Once the existence and scope of the tax avoidance arrangement had been established, all those taxpayers who have benefited from it are subject to corrective adjustment by the Commissioner in the exercise of the reconstruction powers conferred by the anti-avoidance provisions.

Mr Russell's counsel, Mr Simon Judd, submitted that Mr Russell was not a person affected by the arrangement. He argued that Mr Russell did not receive a dollar from the arrangement, either directly or indirectly. Wylie J, with respect, stated that this was not the test. The correct test was whether Mr Russell was a person affected by the arrangement through obtaining a 'tax advantage' from it.[602] Nonetheless, Wylie J accepted that Mr Russell did not directly receive any of the income generated by the arrangement, but that was because the *purpose* of the arrangement was to ensure that he did not have to pay tax on that income.

Wylie J agreed with the TRA that the income was Mr Russell's personal exertion income. His Honour also agreed with the TRA that Mr Russell was the only real person underpinning the arrangement. He was the person who 'pulled all the strings'.[603] Mr Russell controlled all of the

---

602 *Russell v Commissioner of Inland Revenue*, above n 35, at [142].

603 At [143].

untaxed monies through the finance companies and no one else could access the funds unless he permitted them to do so. Money was advanced by the finance companies to Mr Russell to enable him to meet his personal obligations. Monies were also advanced to various trusts which Mr Russell had settled for the benefit of his family.

2 Court of Appeal

Mr Russell appeared personally in the Court of Appeal[604] to address the 'Track E' litigation issues in early 2012.[605] During the 2010 High Court hearing, Mr Russell had been represented by Mr Simon Judd. Mr Russell was unable to attend the High Court hearing due to having been in surgery for back related health issues. Mr Russell's daughter and grandson were in attendance to support him in the Court of Appeal. Mr Russell advised this was the first time he had family members in attendance at any of his litigation.

Mr Russell's filed a notice of appeal raising four grounds,[606] however, when Mr Russell filed his submissions, his written outline raised five additional grounds of appeal.[607] After consideration by the Court, only one additional ground for leave was granted, dealing with s 99(4) of the ITA 1976.[608]

The Court agreed with the reasoning of Wylie J that there was an 'arrangement' that was a 'tax avoidance arrangement' and that Mr Russell was a person affected by that arrangement. There was no doubt to the Court that Mr Russell "was the only real person underpinning the whole arrangement."[609]

---

[604] *Russell v Commissioner of Inland Revenue* [2012] NZCA 128. The judges were Glazebrook P, Randerson and Stevens JJ.

[605] *Russell v Commissioner of Inland Revenue*, above n 32.

[606] The four grounds were: that the Judge was wrong to find that there was an "arrangement" as alleged by the Commissioner; that the alleged arrangement was a tax avoidance arrangement; that Mr Russell was affected by the alleged arrangement; and that Mr Russell had obtained a tax advantage from the alleged arrangement.

[607] The five additional grounds of appeal were as follows:

(a) The majority of the assessments were time barred under s 25(2) of the ITA 1976;
(b) The threshold of proving the ingredients of tax avoidance required by the Privy Council in *Peterson v Commissioner of Inland Revenue*, above n 176 had not been met;
(c) The requirement inferred in s 99 of the ITA 1976 and particularised in the Commissioner's Policy Statement for a careful and thorough analysis had not been met;
(d) The assessment process was incomplete because s 99(4) of the ITA 1976 had been ignored; and
(e) The assessments were a product of an alleged longstanding vendetta practised by the Commissioner against the appellant.

[608] There was no dispute as to the applicable law regarding leave. Each of the additional grounds had been dealt with in considerable detail by the TRA and all of the grounds had been determined against the appellant by the TRA. None had been argued on appeal to the High Court. The Court of Appeal was of the view that the only ground that had even a remote chance of success was the s 99(4) ITA 1976 point.

[609] *Russell v Commissioner of Inland Revenue*, above n 32, at [64].

A centrepiece of Mr Russell's submissions was that he had not received, in any form whatsoever, any of the income that had been assessed to him. He submitted that it was entirely permissible for him to carry on his consultancy business through a partnership and corporate entities and it was they, and not him personally, that received the income. In essence he was arguing that the Commissioner ought not to have reconstructed the income to him personally. Previous Russell-related litigation provided the answer to allow the Court to reject this argument. The Commissioner has broad powers of reconstruction under s 99(3) ITA 1976. Speaking for the Court in *Miller*,[610] Blanchard J stated:

> Section 99(3) gives the Commissioner a wide reconstructive power. He "may" have regard to the income which the person he is assessing would have or might be expected to have or would in all likelihood have received but for the scheme, but the Commissioner is not inhibited from looking at the matter broadly and making an assessment on the basis of the benefit directly or indirectly received by the taxpayer in question.

With respect to a reconstruction the onus is on the taxpayer to establish that the reconstruction is wrong and by how much.[611] The Court was not satisfied that Mr Russell had satisfied that onus.

Looking at the broader facts, the Commercial Management Partnership was controlled and managed by Mr Russell as its sole architect. He made all of the decisions as to where substantial money flows went and how it was treated by the partners, and throughout the 1985 to 2000 period, manipulated the partnership, corporate, finance company and trust entities as he saw fit, yet at the same time was receiving only a nominal income[612] for the provision of consulting services.

Their Honours concluded that what Mr Russell was doing involved more than just income allocation for genuine business reasons. Mr Russell was seeking to 'launder' through the Commercial Management Partnership, and the other partnership and corporate entities controlled by him, the whole of the substantial income from the Russell template system, itself a clear tax avoidance system.[613]

This had extensive and dramatic financial consequences. Nominal taxation was paid by Mr Russell or the partners in the Commercial Management Partnership or the later partnership over a 15 year period.

---

610 *Miller v Commissioner of Inland Revenue*, above n 487, at 32.

611 *Buckley & Young Ltd v Commissioner of Inland Revenue*, above n 504, at 498. See also *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 47, at [171].

612 Mr Ruffin, for the Commissioner, referred to some similarities with *Penny v Commissioner of Inland Revenue*, above n 596.

613 *O'Neil v Commissioner of Inland Revenue*, above n 2.

One area where the Court of Appeal reasoning differed from that of Wylie J was in respect of his reliance on the notion that the monies resulting from the Commercial Management Partnership business ought to be characterised as 'personal exertion income.'[614] The Court of Appeal did not consider that such a descriptor necessarily assisted the analysis, preferring to rest their conclusion as to the purpose of the overall arrangement and the tax advantage derived from it on a broader basis. The overall scheme was the means by which Mr Russell laundered the profits from the Russell template transactions [redacted]

Their Honours thought this ought not to be characterised as income earned by Mr Russell personally. It was income earned by the Commercial Management Partnership and other entities within the structure set up by Mr Russell utilising the staff employed by those entities.

The income earned from 1985 to 2000 was to be attributed to Mr Russell because he was affected by the arrangement on a *Penny*[615] basis and because he was the governing mind of the template arrangements and those other structures and arrangements designed to shelter from tax the income earned from the template arrangements in the Russell group of companies.

Their Honours accepted that it was not inevitable that a tax avoidance arrangement by a company will or should be attributed to a shareholder. Each case would depend on its own facts and in the 'Track E' case, there were 'very unusual' facts. The income itself came from tax avoidance arrangements orchestrated by Mr Russell and was sheltered by similar tax avoidance arrangements also orchestrated by him.

The additional ground permitted by the court for consideration was s 99(4) ITA 1976, despite the fact that Mr Simon Judd as counsel had not pursued it in the High Court. Essentially Mr Russell was saying that the Commissioner had not completed the assessment process required by s 99 ITA 1976 in that the adjustments required by s 99(4)[616] had not been carried out.

Mr Russell had contended that on its correct interpretation s 99(4) is 'instantaneous and automatic', requiring the Commissioner to make an adjustment as soon as any income is included in the assessable income of any person pursuant to s 99(3). Mr Russell was submitting that the failure of the Commissioner to adjust as required by s 99(4) vitiated the assessments "which should be cancelled as a result".[617]

---

[614] *Russell v Commissioner of Inland Revenue*, above n 35, at [146] and [148].

[615] *Commissioner of Inland Revenue v Penny & Hooper*, above n 595.

[616] Section 99(4) provided "Where any income is included in the assessable income…of any person pursuant to subsection (3) of this section, then, for the purposes of this Act, that income shall be deemed to have been derived by that person and shall be deemed not to have been derived by any other person."

[617] *Russell v Commissioner of Inland Revenue*, above n 32, at [77].

The Privy Council had addressed an argument in *Miller*[618] by the appellants based on s 99(3) ITA 1976 in 2001, in relation to the change of track from 'Track A' to 'Track B'. The submission was that only one party can obtain a tax advantage from an arrangement concerned. The appellants had argued that if the Commissioner thought that the trading company had obtained the advantage ('Track A'), he could not properly have thought that the appellants (the Millers and O'Neil's,) had obtained one (under 'Track B'). The Privy Council rejected this submission.

The appellant then submitted that the 'Track A' and 'Track B' assessments were in fact inconsistent. It was asserted that the Commissioner could not validly make a 'Track B' assessment while a 'Track A' assessment in respect of the relevant company was outstanding. Again, this argument was rejected by the Privy Council.[619]

The principles from the Privy Council in *O'Neil* were considered relevant in the present context of 'Track E'. I attended the Court of Appeal 'Track E' hearing as part of my research. [redacted] Unfortunately I was unable to stay for the second day of the hearing due to teaching commitments.

3 The final say – the Supreme Court

The final 'chapter' in the 'Track E' litigation was delivered on 13 August 2012. The Supreme Court[620] dismissed an application for leave to appeal.[621] Mr Russell had indicated to the author earlier that this decision would not be unexpected to him. The statutory criteria for leave was not made out. In essence, the Court of Appeal decision represented the application of well settled legal principles to the particular facts of Mr Russell's case. The Court of Appeal upheld the findings in the TRA and the High Court that there was an arrangement; that its purpose or effect was to alter the incidence of tax; that Mr Russell was affected; and that the tax avoidance involved was more than merely incidental.

[618] *O'Neil v Commissioner of Inland Revenue*, above n 2, at [31].

[619] At [33].

[620] The Supreme Court was composed of Elias CJ, Tipping and William Young JJ.

[621] *Russell v Commissioner of Inland Revenue*, above n 52.

The Court of Appeal was also satisfied, being in agreement with the Authority and the High Court, that Mr Russell had not shown the Commissioner's reconstruction was wrong, let alone by how much. The Court of Appeal had given Mr Russell leave to advance a point which he had not expressly taken up in the High Court, the effect of s 99(4). The Supreme Court, after careful examination of this matter, was satisfied that there was no merit in this point. None of the matters which Mr Russell sought to raise by further appeal to the Supreme Court were matters of general or public importance. There was no basis for concern that a substantial miscarriage of justice may occur if leave was not given. The Supreme Court stated that there was a further reason why granting leave would not be in the interests of justice. None of the points Mr Russell sought to raise were reasonably arguable in his favour. Further, the Court of Appeal was undoubtedly correct in the conclusions to which it came to on the facts of this case.

'Track E', the last of the five 'tracks', will undoubtedly be the track that leads to Mr Russell's bankruptcy at some future date. Once again the question is raised, what has the cost been to so much litigation, and secondly, was the cost worth it?

Coleman[622] fears that, despite the Supreme Court's refusal to allow Mr Russell to appeal, this is not the end of the long running 'battle'. [redacted]

4 'Track F'

During our time together in July 2011 at the University of Canterbury interviews Mr Russell alluded to a 'Track F' being 'conjured up' by the Commissioner [redacted] In a recent decision[623] submissions made by Mr Russell mentions a Track 'F'.[624] This is connected to

---

[622] James Coleman, "Tax Update – James Coleman, Barrister, Wellington examines the legacy of two decades of Russell litigation" [2012] NZLJ 290 at 291.

[623] *Case 5/2012* [2012] NZTRA 05, (2012) 25 NZTC 1,017 at [79].

[624] Mr Russell's submissions state:

> 6. "Since the hearing and as recently as 3 November 2011 the Commissioner submitted to the High Court at Auckland in the judicial review proceedings that he now believes that services were provided by the parent companies in respect of the administration charge and that GST is payable on those services. This new view of the Commissioner which we can label as Track F plainly has consequences in both income tax and GST regimes. The foundation for disallowance of the administration charge in Tracks A and B obviously disappears so those cases must be reviewed and amended assessments made accordingly.
>
> 7. In addition, the previous view of the Commissioner that in the template cases no input tax was claimable because the services were provided can no longer be sustained. In other words the inputs are clearly deductible as a result of Track F.

the ongoing ‘tortuous saga’ related to the FB Duvall litigation. It would appear that Coleman may prove to be correct to assume that the long running battle will last yet a little longer.

8. Under the Commissioner’s new Track F view it would follow that inputs of the nature in these cases would have to be deductible.”

Chapter VIII
The ‘Sensitive Issue’ – the Vendetta

VIII The 'Sensitive Issue' – The Vendetta

[redacted][625]

Although the issue of judicial bias had never been raised in template cases prior to Mr Russell's personal assessment under 'Track E', the situation is somewhat different in relation to the issue of vendetta. The vendetta claim has been raised by, and for, Mr Russell (and some of his many clients) on many occasions over the past 20 years or so. Judge Barber has stated that he had always made it clear that Mr Russell may develop the vendetta argument before him whenever it suited him to do so and in detail and at length.[626] First though, clarification of what would be vendetta conduct must be ascertained.

Mr Russell's legal counsel, Mr Gary Judd, QC, referred to 'The New Shorter Oxford Dictionary' including as a meaning of 'vendetta' as "a prolonged bitter quarrel with or campaign against a person".[627] The Merriam-Webster Dictionary uses the description of 'an often prolonged series of retaliatory, vengeful, or hostile acts or exchange of such acts.'

A 'Sensitive Issue' – [redacted]

[redacted] This reached its peak with about nine charges to be prosecuted at one time.[628] [redacted]

[625] Disputant's Brief of Evidence on Threshold Issues in *Case Z19*, above n 442.

[626] *Case Z19*, above n 442, at [73] - [74].

[627] *Case W37*, above n 325, at [34].

[628] Mr Russell had been convicted for failure to provide information as required under s 17 IRDA in 1990. He had challenged his conviction by way of judicial review in *Russell v Latimer*, above n 356. The total of nine charges was surpassed when in 2005 Inland Revenue laid 106 charges, all of which failed due to a delegations technicality.

[redacted][629]

[redacted][630]

[redacted][631]

[redacted][632]

[redacted]

[redacted]

[redacted

[redacted][633]

Mr Russell raised the vendetta argument again in 1996 in the High Court before Baragwanath J in *Miller Commissioner of Inland Revenue*[634]. Baragwanath J stated that:[635]

> the plaintiffs are aggrieved that they sought to raise the vendetta issue before the Taxation Review Authority which in fact delivered a final decision without dealing with it, being of the view, recently corrected by the *Golden Bay*[636] decision, that it had no jurisdiction to consider the question.

Baragwanath J further stated that it was therefore appropriate for him to address the issue and deliver a decision. His Honour held that the plaintiffs had demonstrated that the Commissioner's staff had gone to considerable lengths to investigate and challenge the use of Mr Russell's business structure. There was evidence of the establishment of a team of inspectors whose task was to carry out what was described in one document as an "attack plan". Quite surprisingly, his Honour referred to a minute written by Inland Revenue staff that contained the words "[it] may not be entirely legal but may help stem the flow."[637] The

---

[633] [redacted]

[634] *Miller v Commissioner of Inland Revenue,* above n 142. Contention 6 of the High Court Judicial Review proceedings was that the Commissioner had acted for the improper purpose of assisting in a vendetta against Mr Russell.

[635] *Miller v Commissioner of Inland Revenue*, above n 142, at 13,046.

[636] In *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* (1996) 17 NZTC 12,580 (CA), the Court of Appeal rejected the taxpayer's argument that a challenge to the validity of an assessment (as distinct from its correctness) could only be made by seeking judicial review and that the objection procedure was available only when there was a valid assessment. Mark Keating, *Tax Disputes in New Zealand: A Practical Guide*, (CCH New Zealand, Auckland, 2012) at 301.

[637] *Miller v Commissioner of Inland Revenue*, above n 142, at 13,046.

allusion was to attempt to deter accountants from involving their clients in the use of the Russell business structure. [redacted][638] Baragwanath J quite rightly saw such an attitude within the ranks of Inland Revenue staff charged with administering the tax system as 'troublesome'. His Honour wrote that "the author has done a disservice to other officers who adhere to the spirit and letter of the law in performing their difficult task". He further stated that "the temptation to over react against conduct seen as anti-social must be curbed".

The plaintiffs also relied on another piece of evidence, an observation by Judge Barber, where his Honour said:[639]

> I have been sitting on these Russell cases for more than 10 years and I have to say that the Commissioner seems to have some sort of hang up as Mr Russell is concerned and does funny things that are quite unbalanced really.

While this statement to most reader's eyes would indicate that the Commissioner has not treated Mr Russell or his clients impartially, it is interesting to see how his Honour dealt with the statement. Baragwanath J stated the evidence was hearsay.[640] In view of its generality and the fact that it was tendered in reply, his Honour was not prepared to treat it as admissible at common law in light of *R v Baker*[641] and *R v Bain.*[642] It was admissible under s 3 of the Evidence Amendment Act (No.2) 1980 but his Honour considered it to be of limited weight.[643] His Honour did accept that from time to time during the long process of attack and counter attack between the parties the Commissioner's staff had become deeply troubled by Mr Russell's conduct and had sometimes over reacted. Baragwanath J was of the view that there was no such evidence of misconduct in the preparation of the assessments under challenge (Track B) to warrant the Court's setting them aside.

Baragwanath J continued that one can well understand why Mr Russell felt himself and the directors who adopted his business structure to be 'targeted', stating that Mr Russell was firmly of the view that his 'meticulously crafted' business structure entitles,[644] those

---

[638] [redacted]

[639] *Miller v Commissioner of Inland Revenue*, above n 142, at 13,046.

[640] For more on hearsay evidence, see C. Gallavin, *Evidence*, (Lexis Nexis NZ Ltd, Wellington, 2008) at Chapter 5.

[641] *R v Baker* [1989] 1 NZLR 738 (CA) at 741.

[642] *R v Bain* [1996] 1 NZLR 129 (CA).

[643] A 'hearsay statement' is defined in s 4 [Interpretation section] of the Evidence Act 2006.

[644] *Miller v Commissioner of Inland Revenue*, above n 142, at 13,046 recorded Mr Russell as having stated: "The intent of the Commissioner as far as my companies are concerned on either Track A or Track B is simply to deny my companies use of the tax losses in the manner allowed by law and to make nugatory the provisions of s 181 and 191 as far as my companies are concerned."

availing themselves and their companies of it, to pay no tax. His Honour considered the military metaphors about 'attack plan' and 'war', the justified fear that the Commissioner's officers were out to "destroy his business", coupled with the long years of assessment, objections and litigation made polarisation inevitable. Baragwanath J was satisfied that Inland Revenue's purpose in seeking to "destroy" Mr Russell's business was to terminate what its members were entitled to see as flagrant tax avoidance, which was their statutory function to address.

1 [redacted]

[redacted][645]

[redacted][646]

In 2004 Judge Barber commented with regard to the multiple tracks of assessment as follows:[647]

> With regard to vendetta, it seems that the objectors' case may be that, in effect, the Commissioner *"blinded by his dislike for Mr Russell"* (to use Mr Judd's words) has been devising multiple tracks of assessment when "if he dispassionately and impartially considered the law and the facts known to him" he could (assuming the arrangement to

[645] [redacted]

[646] [redacted]

[647] *Case W37*, above n 325, at [57].

> be void by s 99(2)) conclude that only one reconstruction was correct and that he has moved from track to track (i.e. from one reconstruction to another pursuant to s 99(3)) because he is motivated by a vendetta against Mr Russell.

Judge Barber was reminded by Mr Ruffin that there was an express finding of Baragwanath J in the *Miller & O'Neil* litigation[648] that there was no evidence of vendetta against Mr Russell or his clients from the Commissioner and/or his staff. However, Judge Barber found that vendetta was still a remaining justiciable issue stating:[649]

> …However, that was some years ago. While I do not think I have yet seen evidence of vendetta, the issue has not been heard before me. As the parties know, I am allowing Mr Russell, if he so wishes, 10 full hearing days to package his case about vendetta into one so that he can make it as strong as he is able to.

[648] *Miller v Commissioner of Inland Revenue*, above n 142, at [340].

[649] *Case W37*, above n 325, at [58].

B Settlement at Last! ... Not Quite!

The *Kemp*[650] litigation may have unfortunately left an unfavourable lasting impression for the taxpayers of Inland Revenue processes. The Commissioner had agreed to compromise the collection of the full tax liability owing by the taxpayers[651] who had been reassessed following their participation in the Russell template. Section 414A ITA 1976 permitted the Commissioner to write off a maximum of $50,000 in unpaid tax but any greater amount required authorisation by the Minister of Revenue. It is surprising that in spite of this section, Inland Revenue entered into settlement deeds writing off disputed tax in excess of the $50,000 limit. This error was not identified until long after the settlements had been finalised, and in some instances not until long after the agreed amounts of tax had been paid. Certainty[652] is a principle of a good tax or a good tax system and it is difficult to reconcile this principle with the *Kemp* litigation. Prima facie one would expect a settlement deed arrangement entered into bona fides, to be certain and final.

[redacted][653]

650 *Kemp v Commissioner of Inland Revenue* (1999) 19 NZTC 15,110 (HC).

651 The taxpayers each owed core tax exceeding $50,000 with the exception of one person, Mr Winter.

652 John McCulloch (ed.): Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (Ward Lock and Co, 1776).

653 [redacted]

This thesis has not captured any direct comment from a participant to the Russell template schemes, although that may be an area of future research.[654] An insight is gained however into the template participant's reliance on Mr Russell. In *Case L85*[655], one of the 'pre template' cases, a clause stated that all correspondence was to be directed through Mr Russell and Commercial Management Ltd. It is clear that template participants placed a lot of reliance on Mr Russell's tax opinions and in many respects were distanced from direct Inland Revenue contact in many instances.

The High Court adjourned proceedings to ascertain the Minister's attitude before continuing. In each case the Minister would have approved the remission of additional tax but would have declined the remission of the core tax amount. The Minister also advised that subject to whether he had the power to retrospectively approve something which he should have approved prospectively, "he was likely to do so now."[656]

Robertson J stated in the first line of his judgment "this is an extraordinarily long running saga," a theme consistent with almost the entire Russell related litigation. The taxpayers sought declarations that to resile from the settlement was invalid,[657] the Commissioner had concluded that taking into account all the circumstances he should not resist the relief sought by the taxpayers. Counsel for the Minister advised that the Minister would abide by the reason of the Court. His Honour, Robertson J questioned counsel as to why the Court should be involved in the matter at all, if all parties were of the view that honouring the settlements was appropriate.

Legally however it was simply not that simple. His Honour recognised that the Commissioner had a statutory duty to collect tax lawfully due, but also there was a public policy issue that once an agreement or deal had been made it should be upheld and preserved. Section 414A ITA 1976 was a mandatory section and not obtaining the Minister's consent was "not a trivial or unimportant irregularity that the Court might overlook."[658] It was suggested by the

[654] [redacted]

[655] *Case L85*, above n 382.

[656] [redacted]

[657] The causes of action raised by the five separate plaintiffs were failing to take into account relevant considerations; a breach of natural justice; a breach of legitimate expectation; an improper purpose; proper delegation; mistake of fact; unreasonableness; and bad faith. Costs were also sought.

[658] The mandatory nature of s 414A 1976 was raised by the Commissioner's counsel. In support the Commissioner cited *Brierley Investments Ltd v Bouzaid* [1993] NZLR 655 (CA) [also reported as *Brierley Investments Ltd v Commissioner of Inland Revenue* (1993) 15 NZTC 10,212 where the Court of Appeal discussed the legislative scheme. The "specific and very limited powers of relief from the statutorily imposed liability" were discussed at NZLR 659; NZTC 10,215. His Honour observed that the language suggested that, but for the specific empowerment in the relevant sections, no relief is possible.

Commissioner that even if a general power to enter into settlements with taxpayers was held to exist, it would not override specific requirements laid down by Parliament for the exercise of powers of remission. In essence, a general power could not create a 'back door' for settlement which did not meet the explicit statutory requirements.[659]

Robertson J concluded that as the statutory requirements had not been complied with the Commissioner did not have the power to enter into the settlements and in doing so his actions were *ultra vires*. In *R v Monopolies Commission, Ex parte Argyll*,[660] a case where the Monopolies Commissioner's actions were *ultra vires* it was held that it was not appropriate to exercise the Courts discretion to set aside the action. By way of brief summary Sir John Donaldson MR considered the following principles in reaching his conclusion:[661]

> Good public administration is concerned with substance rather than form….good public administration is concerned with speed of decision, particularly in the financial field…good public administration requires a proper consideration of the public interest…good public administration requires a proper consideration of the legitimate interests of the individual citizens, however rich and powerful they may be and whether they are natural or juridical persons, and lastly good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary.

His Honour was persuaded that he should not exercise his discretion. With respect to the *Kemp* litigation it was noted that the decision to resile from the settlements was made up to three years after the settlements were made, and that the application of the Court for an order quashing presumptive validity was made up to five and a half years later. It was further noted that decisiveness and finality are required in the tax field as exemplified by the inclusion of such mechanisms as the statute time bar in the tax legislation, and that no taxpayer would expect after detailed examination of their tax affairs and agreement being reached in relation thereto that Inland Revenue would resile from that agreement unless information had been withheld at the time of entering into the agreement.

Robertson J accepted the force of these arguments, however also stating the inescapable fact that the purpose of the administrative process as specified in s 414A ITA 1976 was totally ignored in this case. His Honour placed weight on the fact that an albeit retrospective

---

[659] His Honour was invited by all counsel to exercise the jurisdiction vested under s 5 Judicature Amendment Act 1972. This Act provides that on an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief and here the decision has already been made, may make an order validating the decision, notwithstanding the defect or irregularity, to have effect from such time and on such terms as the Court thinks fit.

[660] *R v Monopolies Commission, Ex parte Argyll* [1986] 2 All ER 257 (CA).

[661] *Kemp v Commissioner of Inland Revenue*, above n 650, at 15,119. See also John Caldwell, "Judicial Review: The Fading of Remedial Discretion?" [1988] NZLJ 238.

consideration of the settlements of the Minister indicated he would not have given his consent. His Honour accepted that there is clearly a public interest in taxpayers being able to rely on agreements made with Inland Revenue; however, this was balanced with the public also having an interest in seeing that laws are not ignored with impunity, particularly by those who are given power to exercise discretion as between taxpayers. His Honour was satisfied that the Commissioner had no option but to resile from the settlements which were made without lawful authority. With the agreement of all counsel Robertson J remitted the additional tax (apparently $2,657,933). The matter proceeded in terms of the core tax. Robertson J rejected the taxpayers' attempts to rely on the agreements in the face of the clear statutory language of s 414A(5), even though the settlement agreements were not explicitly based on s 414A. However, Robertson J did allow the taxpayers relief on the first $50,000, on the basis that the Commissioner did not require approvals for amounts under $50,000.

As an interesting aside in relation to costs his Honour was of the clear view that this was "one of those rare cases"[662] where r 46(2) (a)[663] of the *High Court Rules* should be applied and a successful party should be ordered to pay costs to an unsuccessful party. The plaintiffs were entitled to proper costs in respect of this litigation which arose because of errors made by the Commissioner.

New Zealand tax legislation has not expressly provided a power for the Commissioner to settle a dispute with a taxpayer, at least until the enactment of ss 6 and 6A TAA 1994.[664] Cullen states that "it appears such power has always been implied, and the Commissioner has in fact reached settlement agreements in many disputes on the assumption that he had such power".[665] The *Kemp* litigation is evidence that such settlement agreements have included time payments of core tax, and probably of additional tax without ministerial approval. One must wonder why *Kemp* was essentially reopened after several years passing. Cullen considers that Inland Revenue confused matters in the case.

---

[662] *Mirelle v A-G and Ministry of Commerce* (1993) 7 PRNZ 107 at 109.

[663] The *High Court Rules* were substituted as from 1 February 2009 by s 8(1) Judicature (High Court Rules) Amendment Act 2008 (2008 No 90). Despite its plain wording, the general discretion as to costs in r 14.1 is qualified by the specific costs rr 14.2-14.10, and exercisable only in situations not contemplated by those specific rules, or which are not fairly recognised by them: *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606, (2004) 16 PRNZ 1047 (CA). In *Glaister* the Court of Appeal at [21] gave this rationale: "The…costs regime…is of a regulatory character. It is important that the integrity of that scheme be maintained." It added, at [22], that any departure must be done "in a particularised, and principled way". The Court then stated at [24]: "[T]he discretion exists to enable the unexpected and the unforeseen to be fairly accommodated. It is not a case of r 46 [r 14.1] having an exclusionary primacy over r 47 [r. 14.2] (or any other rules): the rules are complementary, and designed to produce an effective whole." And added at [28]: "The discretion exists, and this Court has noted that where Judges are satisfied that it is appropriate to do so they ought not to hesitate to resort to the discretion. But…such an exercise…must be a considered and particularised exercise of the discretion."

[664] Robbie Cullen, "Settling tax disputes – the effect of litigation risk", (August 1999) *NZ Tax Planning Reports* 1.

[665] At 1.

With respect to a hardship application the taxpayer would go 'cap in hand' once the taxpayer has conceded liability to tax, a settlement situation is where the liability is disputed. It is suggested by Cullen that it would appear in *Kemp* that these two matters were confused. The Commissioner had entered into settlement arrangements (which included instalment payments) with certain taxpayers. Crucially the settlements did not purport to be made under s 414A. The taxpayers honoured those settlement arrangements and gave up their objections. Cullen considers the Commissioner did not obtain the Minister's approval for the settlements, presumably because he did not think it was required.

The Commissioner then unilaterally backed out of the arrangements, on the basis that s 414A(5) had not been complied with. The Commissioner purported to rely on comments in the Court of Appeal decision in *Brierley*.[666] In *Brierley* the Commissioner had indicated how he would treat existing and future transactions for tax purposes, by way of an informal ruling.

The taxpayers in *Kemp* complained and sought judicial review and declarations to enforce the settlement arrangements. His Honour Robertson J directed the Minister to consider the arrangements. The Minister did not approve them, indicating in an affidavit that he would have remitted the additional tax but not the core tax. Cullen states that "on the statutory language this may be a little dubious, but is clearly a correct 'judgment' in the circumstances." The taxpayers' rights of objection had lapsed; they had given up those rights under the settlement and were out of time. It would appear that the *Kemp* settlements were made prior to s 6 and 6A TAA 1994 coming into force. Those sections were mentioned in the case, but the case was not decided on them. It seems that if the settlements in *Kemp* were made after ss 6 and 6A TAA 1994 came into force the result might have been different. The settlements were not made under s 414A at all, and accordingly s 414A(5) would have been irrelevant.

Section 414A does not apply in a settlement situation; it applies to a 'cap in hand' approach by a taxpayer for relief. Section 6 and 6A specifically empower the Commissioner to enter into settlement arrangements as the Court of Appeal made clear in the case of *Auckland Gas*. Cullen considers the settlement power for the Commissioner existed before the enactment of ss 6 and 6A TAA 1994; that the Court of Appeal comments in *Brierley* were made in the different context of an informal Inland Revenue ruling on the subsequent application of the law, and not a settlement; that the Commissioner used the settlement power in the *Kemp* case settlements; and that s 414A was irrelevant in those settlements (section 414A was raised after the event of settlement by the Commissioner as a basis for getting out of the settlement agreements made by him).

[666] *Brierley Investments Ltd v Bouzaid*, above n 658.

Cullen concludes that it seems that the situation in the *Kemp* case settlements (where the Commissioner resiles from a settlement relied on by taxpayers because he had not obtained the Minister's approval) is unacceptable tax administration, whatever the reasons given in the judgment for allowing that to happen.

C GST Refunds – The Paul Finance Case

[redacted][667] An administrative glitch on behalf of Inland Revenue led to litigation spanning six years, when Mr Russell sued Inland Revenue over a dishonoured a GST refund cheque. The original 1994 High Court decision[668] was upheld in the Court of Appeal[669] in 1995, and initially it appeared that that may have been the end of the matter. The November 1995 *Tax Information Bulletin* commented on the Court of Appeal application for summary judgment even stated "The taxpayer is not appealing this decision."[670]

However, in December 1999, the High Court gave leave for the taxpayer to file an amended statement of claim commencing 'round two' of the *Paul Finance* litigation. The taxpayer sought exemplary damages[671] in addition to the claimed refund.

The facts of this case are relatively straightforward. Paul Finance Ltd had filed a GST return[672] claiming a refund.[673] On 23 April 1993 Inland Revenue advised Paul Finance Ltd that a routine check was being undertaken and the refund sought would be delayed pending receipt of information.[674] Copies of various working papers, bank statements, cash books and tax invoices were forwarded to Inland Revenue in July 1993. An Inland Revenue investigator assigned to the case, had a meeting at the premises of Commercial Management[675] on 23

---

667 [redacted]

668 *Paul Finance Ltd v Commissioner of Inland Revenue* (1994) 16 NZTC 11,257 (HC).

669 *Paul Finance Ltd v Commissioner of Inland Revenue* [1995] 3 NZLR 521 (CA).

670 *IRD Tax Information Bulletin*, Volume Seven, No. 5, November 1995 at 32.

671 Exemplary damages sought were stated as $100,000 in *Paul Finance Ltd v Inland Revenue Department* (2000) 19 NZTC 15,600 (HC) at [2].

672 The GST return dated 30 March 1993 for the period ended 28 February 1993.

673 The 'Tax to Refund as Assessed' was $517,947.66 less transfers totalling $132,869.79, plus interest of $32,916.25 leaving a refund for the period ended 28 February 1993 of $417,994.12.

674 Subject to certain exceptions the Commissioner is required to make refunds arising from an excess of input tax deductions and adjustments over output tax (or following a change in accounting basis) within 15 working days of the day following receipt by the Commissioner of the relevant GST return in accordance with s 46 of the Goods and Services Tax Act 1985. The Commissioner may withhold a refund if not satisfied with a return and a decision is made to investigate that return, if a registered person has failed to furnish a return for any taxable period, or when further information is requested in respect of a GST return. In *Sea Hunter Fishing Ltd v Commissioner of Inland Revenue* (2001) 20 NZTC 17,206 (HC) and *Sea Hunter Fishing Ltd v Commissioner of Inland Revenue (No. 2)* (2001) 20 NZTC 17,216 (HC) the High Court confirmed that there was a statutory obligation to refund no later than 15 working days from the day on which the registered person's return was received by the Commissioner.

675 6 Downsview Road, Pakuranga.

August 1993, where he met with Mrs Ravita Maharaj,[676] a person who held herself out as a representative of Paul Finance Ltd. Further information was requested which had not been previously supplied to Inland Revenue in relation to the GST refund claimed.

On 3 March 1994 Mr Rudd, an Auckland Inland Revenue investigator, was checking the status of Paul Finance Ltd's account on the Inland Revenue computer system when he became aware that a debit had been recorded for a refund cheque amounting to $417,994.12. Mr Rudd was aware that all the issues in relation to the GST refund had not been fully clarified at that stage and all information requested had not been received.

Mr Rudd checked the Inland Revenue computer to see whether a cheque had been mailed to Paul Finance Ltd for that amount. Although the cheque had been printed it had not at that stage been sent to the taxpayer. Mr Rudd took steps to try to stop the cheque being sent. However, Mr Rudd's affidavit noted that once a cheque had been printed by the Inland Revenue computer it was impossible to retrieve the physical item from the Inland Revenue mailing system, due to the great number of cheques being printed at any one time, and finding a particular cheque would have involved sorting through all the cheques generated in any one batch.

Mr Rudd was aware the cheque was not due to be posted until the next day so proactively contacted Mrs Maharaj at the first opportunity on 4 March 1994 and advised her that the cheque had been sent in error. Mr Rudd's affidavit stated that "she said she would send the cheque back once she received it."[677] A notice of assessment and cheque were received by Mr Russell on 8 March 1994, four days after Mr Rudd's discussion with Mrs Maharaj. The cheque was not returned but was presented on 8 March 1994.

Mr Russell's affidavit evidence was that he was the only person authorised to commit the appellant and, had the Department contacted him, he would have answered that the cheque would be banked as soon as it was received and he would issue proceedings to recover the amount outstanding if the cheque were dishonoured. The cheque was dishonoured on presentation, the notice of dishonour was given by Paul Finance Ltd to Inland Revenue on 29 March 1994. Inland Revenue refused the plaintiffs demand for payment and summary judgment was sought.

---

[676] [redacted]

[677] Mr Rudd's affidavit at [18] referred to in *Paul Finance Ltd v Commissioner of Inland Revenue*, above n 669, at 4.

The High Court refused to grant summary judgment with Master Gambrill considering the nub of the real argument related to the manner in which each party viewed the steps taken by the Commissioner using the computer to produce a notice of assessment with a cheque annexed.[678] In relation to 'mistake,' she considered that the statutory provisions did not override common law recognition by the court of genuine mistake and the power of the court to recognise such mistake and, in many cases, return the parties to their former position. The Master rejected the argument that Inland Revenue was bound to deal only with Mr Russell.

The Court of Appeal held that the High Court was correct in refusing to grant the appellant summary judgment. The Commissioner had submitted that his actions did not constitute the making of an assessment. The cheque and purported notice of assessment were generated in error and no value was given for the cheque. The Commissioner did not owe any money to the appellant and there was a complete absence of consideration. Richardson J held that there was sufficient material before the Court to show an arguable defence.

In December 1999 the High Court gave leave for the taxpayer to file an amended statement of claim. The taxpayer claimed exemplary damages in addition to the claimed refund, which was subject to other proceedings in *Paul Finance Ltd v Inland Revenue Department*.[679]

The basis of the claim was that the Commissioner's actions in relation to the cheque and the GST assessment (or possibly failure to make a GST assessment) were malicious, and known to be unlawful. The Commissioner acted to deprive the plaintiff of the refund to which the plaintiff was lawfully entitled with the motive of furthering a vendetta against the taxpayer's director and agent, Mr Russell and/or that the defendant so acted to harm Mr Russell by inflicting economic injury on the plaintiff. Section 27 BORA and s 6 of the TAA 1994 were referred to in the claim.

The taxpayer's claims for exemplary damages and moneys by way of a GST refund were struck out by Master Kennedy-Grant as being an abuse of process.[680] Ultimately the taxpayer's application for leave to appeal to the Court of Appeal was refused by Glazebrook

---

[678] On her consideration of the provisions of the Goods and Services Tax Act 1985 and the authorities she concluded that it was arguable whether the Commissioner directed his attention to the making of an assessment. The mechanical act of a computer producing a document labelled Notice of Assessment is not necessarily an assessment in the true sense of the word or in accordance with *Commissioner of Inland Revenue v Canterbury Frozen Meat Co. Ltd* [1994] 2 NZLR 681 (CA).

[679] *Paul Finance Ltd v Inland Revenue Department*, above n 671.

[680] *Paul Finance Ltd v Inland Revenue Department*, above n 671 and *Paul Finance Ltd v Commissioner of Inland Revenue* (2000) 19 NZTC 15,655 (HC).

J.[681] It is difficult to see what else Inland Revenue could have done to stop the cheque or avoid the associated litigation.

D The Failed Section 17 Prosecution – 226 Informations

[redacted][682]

Mr Russell, and his associated client companies, have perhaps received more s 17 TAA 1994 notices to supply information than any other taxpayer in New Zealand. Inland Revenue often requests information, books and documents from any person (not only a taxpayer) without expressly relying on s 17. This practice fosters a spirit of reasonableness and mutual cooperation.[683] If Inland Revenue consider that information will not be provided voluntarily or in a timely manner a s 17 notice will be issued in the first instance. Non-compliance with a s 17 notice will usually result in Inland Revenue invoking statutory remedies.[684]

Mr Russell received a substantial number of s 17 notices to comply with and ultimately his non-compliance resulted with several prosecutions being laid. This was one example of where Mr Russell had some procedural success in relation to his tax affairs. By way of background, 226 informations were laid by Inland Revenue in 2005; however, a large number of these were subsequently withdrawn. Mr Russell stated varying reasons for withdrawal of many of the informations, including charges laid against entities that no longer existed. Ultimately 106 charges were laid.[685] Mr Russell challenged their validity.

---

[681] *Paul Finance Ltd v Commissioner of Inland Revenue* (HC) CP65-SD00 17 August 2000.

[682] [redacted]

[683] Standard Practice Statement SPS 05/08 – Section 17 Notices (July 2005) at [7].

[684] It is an offence not to comply with a s 17 notice with the penalties contained in section 143 and 143A TAA 1994. Section 143 Absolute Liability Offences (1) (b) states that a person commits an offence against the Act if the person 'does not provide information (including tax returns and forms) to the Commissioner or any other person when required to do so by a tax law' and s 143A is a knowledge offence section where a person commits an offence against the TAA if they (b) 'knowingly' do not provide information (including tax returns and forms) to the Commissioner or any other person when required to do so by a tax law. These sections also state that no person may be convicted of an offence for not providing information, or knowingly not providing information (other than tax returns or forms) to the Commissioner if that person proves they did not, as and when required to provide the information, have that information in their knowledge, possession or control. Sometimes, a person will not have the ability to comply with a s 17 notice to provide information within the timeframe required. In these circumstances and where there is genuine difficulty in complying with the demand a modification to the initial demand can be made, however any change to the date for compliance must be made and agreed to prior to the expiry of the original notice.

[685] *Commissioner of Inland Revenue v Russell* (2005) 22 NZTC 19,664 (DC) at [52].

The only witness in this case was Mrs Denise Latimer, who had laid the informations on behalf of the Commissioner. Mrs Latimer had been seconded to the position of Manager of the Tax Avoidance Unit, having its main focus on the affairs of Mr Russell, and had its own structures in terms of legal advice. It became clear, through evidence, that in fact although Mrs Latimer held the title of 'Manager', her role was mainly directed by Mr Paul McDermott,[686] who was the chief investigator and had been at the Tax Avoidance Unit for three months or so before Mrs Latimer arrived there. Mr Russell only became aware that delegation may have been an issue during his cross examination of Mrs Latimer. It was clear to Judge Barber that it was Mr McDermott who was in control of the Tax Avoidance Unit and indeed the decision to launch the proceedings against Mr Russell.

The issue was whether the informations laid on behalf of the Commissioner were valid. Judge Barber appreciated that when Mrs Latimer was seconded to the Tax Avoidance Unit, she was still holding the office or the title of Manager, Technical and Legal Support Group[687] (TLSG). His Honour stated that a person can hold more than one office at any time. In Judge Barber's view, at all material times, Mrs Latimer simply was not in control of the TLSG or the Tax Avoidance Unit. TLSG was not a particular section handling the Russell project. The Tax Avoidance Unit was handling the affairs of Mr Russell and Mr McDermott was in control of that. [redacted]

His Honour accepted that delegations are not legislation, and should not be construed by rules of statutory interpretation, but should be construed pragmatically in the context of enabling Inland Revenue employees to function and administer the Revenue Acts on behalf of the Commissioner. Although Judge Barber accepted that the business of the Commissioner should not be retarded by minor technicalities, criminal prosecutions involve serious steps, not only from the point of view of the Commissioner but also the point of view of the prospective defendant.[688] Judge Barber held these particular proceedings a nullity unable to be overcome. Mrs Latimer's actual work did not fit her departmental title and all prosecutions were dismissed.[689]

---

[686] Mr McDermott retired from Inland Revenue about the end of March 1997, some months after these proceedings were launched. Mrs Latimer then took over control of the Tax Avoidance Unit. It was clear to Judge Barber that Mr McDermott had not delegated authority as the controller of the Tax Avoidance Unit. Mrs Latimer reported to Mr McDermott and it was clear to Judge Barber that she was not in control of the Tax Avoidance Unit at the relevant time. This was stated in *Commissioner of Inland Revenue v Russell*, above n 685, at [20].

[687] This unit is now called Legal Technical Support (LTS).

[688] *Commissioner of Inland Revenue v Russell*, above n 685, at [64].

[689] The existence of a valid delegation was also tested in the *Trinity* tax avoidance litigation where the assessing officer did not hold the delegation necessary to impose a shortfall penalty. A special delegation was granted from the Commissioner to authorise the assessments. Due to the peculiar wording of the special delegation

Keating[690] states that the *Russell* case[691] demonstrates that a lack of delegation can be a complete answer to an assessment or prosecution. [redacted]

Accordingly, it is often prudent to verify whether the delegation for a particular function was correctly held. Mr Russell recalls several aspects of this case. First, this case did confirm the existence of the 'Russell Team' set up within Inland Revenue. Secondly, he appreciated it was sheer luck that went his way: [692]

> Dead lucky…it was only luck…I was able to prove that the person who issued them was unauthorised…it was sheer luck…

In one year Mr Russell received over 3,500 s 17 notices, receiving 101 notices in one day alone. They arrived in large courier bags giving him 10 to 20 days to answer. Understandably there was a lot of information requested. Mr Russell spent quite some time replying but ultimately simply could not keep up. He had kept a record of how many notices were arriving for about a year. [redacted]

The question would have to be asked as to whether this volume of requests would have been made to any other taxpayer as impartiality would suggest, or whether Inland Revenue were attempting to tie up Mr Russell completely with demands affecting any person's ability to comply.

Section 17 notices still arrive at Mr Russell's mailbox. While I was in Kawakawa Bay for a second day of interviewing in April 2010, several s 17 notices arrived that morning. One of them was for an on-going FB Duvall Ltd investigation.

---

the taxpayers contested whether it was effective, the High Court finding it to be valid in the circumstances. See the discussion by Venning J in *Accent Management Ltd v Commissioner of Inland Revenue* (2005), above n 136, at [328] – [353].

690 M. Keating, "New Zealand's Tax Dispute Procedure – Time for a Change" (2008) 14 NZJTLP 425.

691 *Commissioner of Inland Revenue v Russell*, above n 685.

692 Interview with Mr JG Russell, above n 23.

Inland Revenue
Te Tari Taake

Auckland South Service Centre
PO Box 76198
Manukau City 2241
New Zealand
Telephone: (09) 9857100
Facsimile: (09) 9859477

Attn: John Russell
Commercial Management
1439 Clevedon-Kawakawa Bay Road
R D 5
PAPAKURA 2585

Dear Sir

RE: F B DUVALL LIMITED
IRD NUMBER: 13-854-556
OUR REFERENCE: MNK/INV/MM

NOTICE TO FURNISH INFORMATION AND PRODUCE BOOKS AND DOCUMENTS

Information held by Inland Revenue indicates that the above entity now holds a share in a debenture that was issued by Mercantile Developments Limited to Thomas Williams Limited.

Therefore I, Trevor Strang, Team Leader, Manukau Office, being duly authorised by the Commissioner of Inland Revenue under section 7 of the Tax Administration Act 1994 (the Act), require you under section 17 of the Act (copy attached) to furnish in writing the information sought below, and produce for inspection the following books and documents which I consider necessary or relevant to establish the correct tax position of your client.

The information to be furnished, and the books and documents to be produced for inspection, are:

- Financial statements for the years in which the above company held the debenture
- The full general ledger for the years in which the above company held the debenture
- The full set of journals for the years in which the above company held the debenture.

In addition, please provide a list of any of the required documents that are not in your possession or under your control and where known, identify the person who possesses or controls such documents.

Taxpayers' non-disclosure rights
Any document covered by legal professional privilege as provided for in section 20 of the Act is outside the scope of this notice. You should consult your legal advisers if assistance is required in determining whether a specific document is covered by legal professional privilege. Please provide a list of all documents for which legal professional privilege is claimed.

Taxpayers have a statutory right of non-disclosure which applies to certain documents containing tax advice. The statutory provisions are contained in sections 20B to 20G of the Act. If any document required to be disclosed under this notice is eligible for non-disclosure under these provisions, the form *Tax advice document claim* (IR 519) should be completed to make the claim of non-disclosure. A copy of this form can be found on Inland Revenue's

website www.ird.govt.nz The claim is required to be made within 28 days of the date of this notice. The claim should be provided to Inland Revenue as per the delivery instructions below. For further information on the right to claim nondisclosure refer to the SPS 05/07 *Non-disclosure right for tax advice documents* or consult your tax advisor. A copy of this SPS can be found on Inland Revenue's website www.ird.govt.nz

If there is a claim to exercise the right of non-disclosure, the Commissioner may subsequently require disclosure of the tax contextual information from the documents which are subject to a claim of non-disclosure. The Commissioner will notify you in writing if a disclosure of the tax contextual information is required. Refer to the SPS 05/07 *Nondisclosure right for tax advice documents* for further information on the meaning of tax contextual information and the disclosure requirements.

Delivery/Collection Instructions
Please deliver the information to P O Box 76198 Manukau City or 17 Putney Way, Manukau City marked for the attention of Michael Macdonald within 28 days from the date of this notice. If you wish to make other arrangements as to collection will you please telephone Michael Macdonald on 09 9857028.

If gathering this information is going to be time consuming or would otherwise cause you difficulty, please contact Michael Macdonald on the above number as he is willing to assist. If you wish to discuss the content or detail of this notice, please contact Michael Macdonald well before the time mentioned in the preceding paragraph as modifications will be agreed to in cases of genuine difficulty.

Non-compliance
I would point out that it is an offence not to comply with this notice. Failure to comply may lead to a court order being requested to enforce compliance and/or prosecution action. I draw your attention to sections 143 and 143A of the Tax Administration Act 1994. These sections state an offence has occurred where a person does not provide, or knowingly does not provide, information to the Commissioner when required to do so by a tax law. Furthermore section 143B provides that it is an offence for a person knowingly not to provide information to the Commissioner or any other person when required to do so under section 17, where that person or any other person do so intending to evade the assessment or payment of tax.

However, sections 143 and 143A of the Act state that no person may be convicted of an offence for not providing information, or knowingly not providing information (other than tax returns and tax forms) to the Commissioner if that person proves they did not, as and when required to provide the information, have that information in their knowledge, possession or control. Control here is used in its wider sense and includes material held by others on your behalf. I would also point out that once you have complied with this Notice you have the right to inspect the information that you have provided and to correct any such information.

Dated at Manukau Office this 27 day of April 2010.

Trevor Strang
Team Leader

Figure 12: Section 17 Notice to Furnish Information FB Duvall Ltd

E The Dandelion *Case (*Case U11*)*[693]

There are two cases that Mr Russell regards as significant in relation to the issue of vendetta. Mr Russell stated:[694]

[redacted]

Case U11[695] was not a template case; in fact Mr Russell's role was purely on a professional basis, being instructed to act by his client, Dandelion Investments Ltd.[696] It was alleged the taxpayer was prejudiced because of the antagonistic attitude to Mr Russell shown by Inland Revenue officers. These included such matters as withholding information that was essential to the proper preparation by his agent of the case, and managing the trial by ensuring the wrong witnesses were called by the Commissioner. The TRA found that these complaints were made out. Judge Willy was satisfied that in relation to these complaints, the taxpayer was not treated even-handedly. In some respects the Commissioner adopted what the TRA described as a "thoroughly unmeritorious stance."[697] Judge Willy held it was quite wrong for the Commissioner's staff to allow their feelings for Mr Russell personally (whether or not they were well-founded) to rebound to the detriment of the taxpayer.[698] Judge Willy found that the allegations of impartiality and unnecessary obstruction of the taxpayer by the Commissioner to be proven.

The second allegation of managing the trial by ensuring the wrong witnesses were called was considered by Judge Willy[699] to be very serious, and "if made idly would deserve censure."[700] In essence the complaint was that the Commissioner had deliberately chosen an employee to

---

[693] In 1986 the objector (Dandelion Investments Ltd) entered into an arrangement, the effect of which was to avoid tax. Deductible interest was paid on a loan to purchase a subsidiary but, via a series of steps involving the Cook Islands, most of that interest paid was returned to Dandelion as a dividend from the subsidiary purchased. The only expense to Dandelion Investments Ltd were the fees paid to the companies involved.

[694] [redacted]

[695] *Case U11*, above n 293.

[696] [redacted]

[697] *Case U11*, above n 293, at 9,137.

[698] At 9,139.

[699] [redacted]

[700] *Case U11*, above n 293, at 9,137.

give evidence on behalf of the Commissioner whose knowledge was so limited that Dandelion Investments Ltd was precluded from exercising its rights of cross examination in any useful way; in essence stonewalling attempts to prove that the assessment was wrong and by how much.

Judge Willy had some sympathy for the Inland Revenue witness, Mr Clearkin, who was subjected to days of gruelling examination on matters of which he had very little first-hand knowledge.[701] Much of his evidence amounted to no more than his views on the work and the opinions of others.[702] His Honour considered that the witness should never have been asked to bear the weight of the Commissioner's case, and the question was why was he put in that position when there were others much better qualified.

Judge Willy saw only two possibilities: either the witness was called by mistake or the choice of a patently inappropriate witness was by design. In the absence of evidence from the Commissioner on this point his Honour was left to draw his own inferences. His Honour could not accept that somebody as experienced in tax litigation as the Commissioner with all the legal resources would have made such an elementary mistake. Judge Willy concluded that the decision to rely on an inappropriate witness was consciously made. The effect seriously undermined the ability of the taxpayer objector to prove that a tax assessment was wrong and by how much. The decision of the inappropriate witness also added unnecessarily to the hearing, and the time taken to write the judgment. Judge Willy considered it resulted in a serious misuse of the resources of the TRA. More importantly, his Honour stated that it meant that the taxpayer was put into an unhappy position of itself calling the appropriate departmental witnesses, at its own cost, in order to seek to discharge the onus of proof resting on it. It significantly lengthened the case and fuelled Mr Russell's concerns that the taxpayer, for whom he appeared, had not been treated by the Commissioner in an even-handed way.

Judge Willy considered this attitude at odds with the way Mr Russell presents to the TRA and stated "He puts forward, and argues his cases professionally albeit trenchantly."[703] Judge Willy strongly stated that "It is for the courts to decide the merits of the cases that arise, not for the Commissioner to seek to obstruct the objector's ability to have those merits put before the court."[704] His Honour considered this a matter of serious public interest, and saw it as the resources of the Court and monies of clients being dissipated in adjudicating on sterile side issues which should never, (or perhaps rarely), be allowed to arise. His Honour also referred

[701] *Case U11*, above n 293, at 9,138.

[702] At 9,139.

[703] At 9,139.

[704] At 9,139.

to cases involving this taxpayer objector, as well as the *Miller* and *McDougall* cases,[705] as illustrating this sort of wrangling in any case Mr Russell was involved in as becoming the norm.

His Honour stated "this feuding must stop. The Department must treat Mr Russell's clients as impartially as they treat those of any other tax practitioner."[706] Judge Willy found the allegations of lack of impartiality, and unnecessary obstruction of the objector taxpayer by the Commissioner to be proved. Judge Willy held that this finding vitiated the assessment. On appeal[707] before Tompkins J, his Honour was not disposed to disturb that factual finding. However, the finding by the TRA that the lack of impartiality and unnecessary obstruction of the objector by the Commissioner vitiated the assessment did not stand.[708]

[redacted]

[705] Mr Russell had made a similar allegation in *Miller v Commissioner of Inland Revenue*, above n 487.

[706] *Case U11*, above n 293, at 9,139.

[707] *Commissioner of Inland Revenue v Dandelion Investments Ltd*, above n 329.

[708] Tompkins J was not prepared to disturb the TRA's finding that there had been some improper conduct by the Commissioner's staff in their dealings with Mr Russell but concluded that this could not invalidate an assessment properly made some 8 months before Mr Russell's involvement. His Honour considered that the hearing before the TRA was *de novo* (allowing the matter to be considered afresh) and cured any procedural defects that might arise as a result of the Commissioner's staff conduct. His Honour relied upon *Dandelion Investments Ltd v Commissioner of Inland Revenue* [1997] 2 NZLR 96 (HC); (1996) 17 NZTC 12,689; *Russell v Taxation Review Authority* (2000) 19 NZTC 15,924 (HC) and *Miller v Commissioner of Inland Revenue*, above n 487. The hearing before the TRA was for five weeks, and Tompkins J considered there was no possible basis to conclude the taxpayer had not had an adequate hearing. Dandelion Investments Ltd was unsuccessfully appealed to the Court of Appeal where the Commissioner's assessment based on the application of s 99 were confirmed.

F Case U16

The other case considered by Mr Russell as evidence of him being treated unfairly by Inland Revenue is *Case U16*.[709] The case involving Inland Revenue Special Audit[710] concerned deductibility of various expenses of a business conducting motor vehicle auctions.[711] A creditor had put the taxpayer into liquidation and Mr Russell was appointed as receiver. From extensive evidence his Honour concluded that, at all material times, the financial records of the objector company were quite inadequate and in rather a mess. That situation developed well before Mr Russell was able to take control of the taxpayer's affairs, and he had done his best to reconstruct matters but, naturally, in a favourable manner to the objector. With regard to Inland Revenue conduct his Honour stated:[712]

> At this point I record that Mr Russell made extensive submissions along the lines of improper purposes and motives of officers of the respondent and alleged a general vendetta of the respondent's department towards him and his clients. I noted, in the course of the hearing, that I felt that the attitude of the respondent's department to Mr Russell "lacks maturity and needs polishing". I have often felt that the IRD are quite unhelpful to Mr Russell – *sometimes hostile to him and sometimes flippant*. Such attitudes do not assist resolution of tax disputes whether between the department and Mr Russell or his many clients. I appreciate that Mr Russell's interpretation of revenue laws, particularly, in terms of tax avoidance, and his general strategies and the extent of his tax advisory business, are *thorns in the side of the department* and relate to enormous unpaid taxes overall; but *treating him as an enemy of the State* does not expedite resolution. (emphasis added)

Case U16 also casts an interesting light on Judge Barber's assessment of Mr Russell at the time. The case was heard in 1998 with the decision date being 14 July 1999, two years prior to the *O'Neil* Privy Council decision of 2001. Judge Barber makes a comment about the cross

---

[709] *Case U16* (1999) 19 NZTC 9,168 (NZTRA).

[710] Inland Revenue has a specialist unit, Special Audit that conducts investigations into the tax affairs of people who earn income from illegal activities. Special Audit uses information from a number of sources to help with its investigations. Examples of people audited to date include drug dealers, prostitutes, and dealers in stolen goods.

[711] The Case Stated was to decide whether the respondent acted correctly in disallowing various deductions to the objector for the 1991 income tax year of advertising expenses $79,530; entertainment expenses $2,000; purchase of vehicles/goodwill $180,000; disallowing a deduction for the 1992 financial year of legal fees $9,019.45; and in assessing additional income of $61,624.24 against the objector that year. Special Audit may have been involved due to the $2,000 entertainment expenses relating to massage parlour services for buyers at the objector's car auctions, rather than being spent on food for a staff Christmas function. In *Case U16,* above n 709 Judge Barber stated at [2] that: "Presumably, only a small number of buyers received that perceived benefit from "sex industry workers" at the massage parlour. Unless the services needed to be somehow provided as an inducement to purchase at a car auction, one wonders about deductibility; but the item has been conceded and the link between the service and the objector's income earning process did not need to be explained to me."

[712] *Case U16,* above n 709, at 9,169.

examination by Mr Russell, indicating that Mr Russell was clearly adept in the court room to do so.[713] In relation to advertising expenditure incurred by the objector Judge Barber stated that "on the balance of probabilities, the explanation for the objector is credible and Mr Russell's conclusions are to be accepted."[714] Mr Russell had accused the Inland Revenue staff of not wanting to understand his explanations with respect to aspects of this case.

Although Judge Barber did not find any substance in the allegations for the objector regarding a vendetta or an abuse of power theme Judge Barber does make a comment in relation to the Inland Revenue running this particular audit by saying:[715]

> … *I did not feel that IRD staff had in this case got a complete grip on this situation*, but rather that they *had been simplistic* in their interpretation of the objector's business modus operandi. I had decided to allow this item to the objector. I appreciate that IRD staff had the real problem of inadequate records, but *they did not seem to ask the necessary questions*, and *many conclusions seem to be the outcome of sampling only*.

This case arguably shows case mismanagement on behalf of Inland Revenue rather than an alleged vendetta. [redacted] The comments by Judge Barber that treating Mr Russell as 'an enemy of the State' flies in the face of the impartial treatment of taxpayers. It would appear that Inland Revenue had 'biased' their approach towards Mr Russell based on past interaction, even though he was only acting as an agent for a client.

[713] At 9,170.

[714] At 9,169.

[715] At 9,174.

Chapter IX
Getting Personal – Judicial Recusal

IX Getting Personal – Judicial Recusal

A rule of natural justice is *audi alteram partem* or 'hear the other party'. [redacted][716]

[redacted]

Mr Russell has 'been heard' by the courts,[717] although even now he does not consider that he has received a full hearing on the alleged vendetta argument.[718] A second rule of natural justice[719] is *nemo judex in sua causa* or 'no one should be a judge in his own cause.' In other words, judges must be unbiased as bias would corrupt outcomes. [720]

Substantive tax litigation over many years can give rise to a taxpayer challenging a revenue authority from a procedural basis. One of the more notable procedural challenges undertaken by Mr Russell has been to seek to have Judge Barber recuse himself[721] from hearing the 'Track E' litigation that personally assesses Mr Russell for substantial tax liability. The doctrine of judicial recusal enables – and may require – a judge who is lawfully appointed to hear and determine a case to stand down, leaving its disposition to another colleague or colleagues.[722]

---

[716] [redacted]

[717] *Case R25*, above n 48 ('Track A') involved at least 43 hearing days before the TRA. *Case Z19*, above n 442 ('Track E') involved 64 days between 3 October 2005 and 30 April 2009.

[718] Mr Russell considers that he has never had a proper hearing in relation to the issue of vendetta. Interview with Mr J G Russell, above n 1.

[719] Section 27(1) Bill of Rights Act 1990 provides that 'every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.'

[720] Richard A. Epstein, What Do We Mean by the Rule of Law?" (Legal Research Foundation, Auckland, 5 August 2004). (First Published by the New Zealand Business Roundtable, Wellington in 2005) at 7. Epstein writes "The need for unbiased judges works itself back into the way we structure a legal system under the rule of law. Thus, the rule of law requires probity in the way judges are appointed, evaluated, staffed and supported."

[721] Mr G Judd QC was legal counsel for Dr Muir in an unsuccessful application for recusal in *Accent Management Ltd v Commissioner of Inland Revenue* (2006) 22 NZTC 19,758 (HC) seeking recusal of Venning J and recall of the judgment. Also affirmed in *Accent Management Ltd v Commissioner of Inland Revenue* [2007], above n 136 and *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 (CA). As previously noted, Mr Gary Judd QC acted for Mr Russell for several years as legal counsel.

[722] For more on judicial recusal see Hon. Justice R. Grant Hammond, *Judicial Recusal, Principles, Process and Problems*, (Hart Publishing Ltd, Oxford, 2009).

At the time of the application to the High Court some 82 cases had been pursued through the TRA.[723] Essentially Mr Russell's key allegations,[724] in his statement of claim were that over a period of 17 years (since November 1989), Judge Barber[725] as the Authority, had heard over 65 of those 82 'template cases' and had made findings that Mr Russell was a 'tax avoidance specialist, has an obsession with saving tax and has a mental block, which affects his judgment.'[726] It was argued that it would therefore be a breach of the principles of natural justice recognised at common law, under s 27 of the BORA 1990,[727] and s 6 of the TAA 1994,[728] in that a reasonable observer,

[723] A significant number of the template cases have been appealed to the High Court, the Court of Appeal, and the Privy Council.

[724] Key allegations were set out in [11] of the statement of claim which read as follows

> [11]. Over a period of 17 years from November 1989 to date His Honour Judge P F Barber as a Taxation Review Authority has heard 65 cases ('the Template Cases') in which:
>
> (a) the plaintiff has appeared as advocate for the objectors; and
> (b) the plaintiff has been a witness for the objectors; and
> (c) the matters in issue have related to financial arrangements devised and implemented by the plaintiff and known as 'the Russell Template'; and
> (d) Judge Barber has made findings that the plaintiff is a tax avoidance specialist, has an obsession with saving tax and has a mental block, which affects his judgment (TRA *Case R25*, above n 48 in particular); and
> (e) Allegations have been made that the second defendant and/or his staff have been undertaking a vendetta against the plaintiff; and
> (f) Judge Barber has made numerous rulings on applications by the plaintiff, as advocate for objectors, for discovery against the second defendant and to subpoena witnesses relating to the allegations of vendetta; and
> (g) Judge Barber has made rulings restricting the scope and duration of the plaintiffs cross-examination of witnesses; and
> (h) Judge Barber has made findings and obiter statements concerning the role of the plaintiff in relation to alleged tax avoidance arrangements in issue in the particular cases; and
> (i) Judge Barber has made comments and given directions concerning the vendetta argument; and
> (j) Judge Barber has made findings concerning whether or not the financial arrangements devised by the plaintiff in the various cases amounted to tax avoidance; and
> (k) Judge Barber has made comments giving his view of the motives of the plaintiff and the plaintiff's conduct of litigation."

[725] Mr Russell has also appeared on occasion before Judge Willy. [redacted]

[726] *Case R25*, above n 48, at 24.

[727] Section 27 of the New Zealand Bill of Rights Act 1990 provides as follows:

> 27 Right to justice
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
>
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
>
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to the law, in the same way as civil proceedings between individuals.

[728] Section 6 TAA 1994: 6 Responsibility on Ministers and Officials to Protect Integrity of Tax System.

fully informed of the facts and circumstances, would perceive a real danger of bias or would conclude there was a real possibility that Judge Barber was biased. Mr Russell submitted that the outcome of his 'Track E' case could in fact be "predicted now."[729] Further, he argued that the law had not been administered fairly or impartially, or according to law on many different occasions during the hearing of the template cases, and claimed that a fresh judicial mind was required to break the cycle which was already tending towards the same outcome in his own case.[730]

The difficulty with Mr Russell's argument based on s 6 TAA was that it depended upon the TRA[731] falling within s 6(1) which referred to 'every Minister and every officer of any government agency…' It is only those persons who, pursuant to the statute, have the obligation to protect the integrity of the tax system.[732]

An initial application[733] was declined and Mr Russell commenced review under the Judicature Amendment Act 1972. In *Russell v Taxation Review Authority*[734] his Honour Cooper J stated that the claim was based on presumptive bias,[735] and it was alleged that because Judge Barber had consistently held against Mr Russell over many years,[736] in which arrangements designed by Mr Russell have been the subject of litigation before the TRA, there must be a reasonable apprehension that Judge Barber would not bring an impartial mind to the resolution of the case.

6(1) [Ministers and officials to protect integrity of tax system]. Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system.

729 *Russell v Taxation Review Authority*, above n 585, at [40].

730 At [45].

731 Taxation Review Authorities are established pursuant to s 5(1) Taxation Review Authorities Act 1994. Each Authority is one person, who must be a District Court Judge or a Barrister or Solicitor of the High Court of not less than seven years' practice. For some years Judge Barber was the only appointed Authority. The appointment is made by the Governor-General on the recommendation of the Minister of Justice s 5(4) Taxation Review Authorities Act 1994.

732 *Russell v Taxation Review Authority*, above n 585, at [46].

733 *Case Z3* (2009) 24 NZTC 14,027 (NZTRA).

734 *Russell v Taxation Review Authority*, above n 585.

735 [redacted]

736 *Russell v Taxation Review Authority*, above n 585, at [4].

Cooper J heard the High Court appeal[737] with the application for review being dismissed. In considering the wording of the section, his Honour referred to s 6 being amongst the provisions of Part 2 TAA headed 'Commissioner and Department.' His Honour considered the wording of s 6 did not cover the role and functions of the TRA. Plainly, the Authority was not to be equated with the Minister, nor are its members from time to time an "officer of a government agency having responsibilities…in relation to the collection of taxes."[738]

Mr Russell submitted that he had the right to the observance by the Authority of the principles of natural justice, in simple terms arguing that the right set out in s 27(1) BORA entitled him to a fair hearing before an unbiased Judge who would apply lawful and logical analysis and principles in determining his case.

Section 27 BORA did not add in any significant way to the relevant common law principles. His Honour considered the cases on bias to understand the content and consequences of the entitlement to natural justice, and to assess whether or not the facts on which Mr Russell relied established a viable claim that there was a breach of his rights. Both parties[739] referred to and relied on the decision of the Court of Appeal in *Muir v Commissioner of Inland Revenue (Muir).*[740] The Court in *Muir* said:[741]

> In our view, the correct inquiry is a two stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that the complainant cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged Judge that a belief in her own purity will not do; she must consider how others would view her conduct.

---

[737] *Russell v Taxation Review Authority*, above n 585.

[738] A government agency is defined for the purposes of s 6, in s 3 of the TAA. It includes any department or Crown entity (as those terms are defined in the Public Finance Act 1989) and any 'public authority' as defined in the ITA 2007. The Authority is plainly not a 'department', since s 2 of the Public Finance Act relevantly defines that word by reference to a department or instrument of the government or any branch or division of the government, and 'government' itself is defined as the 'executive government'. The definition of 'Crown entity' is found in s 7(1) Crown Entities Act 2004. The definition does not include the Authority.

[739] Mr Russell in *Russell v Taxation Review Authority*, above n 585, at [57] placed some emphasis on what the Court said in *Muir v Commissioner of Inland Revenue*, above n 721, at [64]: "It is not possible or desirable to create a catalogue of disqualifiers for Judges in which a reasonable apprehension of bias may arise, but some broad principles can be stated. First, a Judge should not decide a case on purely personal considerations. Secondly, there should not reasonably be room for a perception that the Judge will decide the case on anything but the evidence in front of him or her. Thirdly, a Judge must be in a position to consider all potentially relevant arguments. Fourthly, there may conceivably be a series of events or ruling which reasonably warrant an inference that the challenged Judge's perception is warped in some way."

[740] *Muir v Commissioner of Inland Revenue*, above n 721.

[741] At [62].

Although the Statement of Claim was filed before *Muir* was heard, Mr Russell was content to argue the matter on the basis that the law was as has now been set out in *Muir*. Although Mr Russell's submissions came close to alleging actual bias by the Authority the claim was not pleaded so as to make such an allegation. The contention was that, having regard to Mr Russell's acceptance of the law as set out in *Muir*, that a fair minded observer would reasonably apprehend that the Authority might not bring an impartial mind to the resolution of the case. His Honour considered some of the circumstances upon which Mr Russell relied.[742] The difficulty was, except in a few instances, Mr Russell did not descend into any details which could justify a conclusion that the Authority had acted wrongly when it took any of the steps criticised by Mr Russell.

In concluding, Cooper J stated that in terms of specific 'disqualifiers' mentioned in *Muir*,[743] Mr Russell was effectively left to argue that there could be a perception that the Judge had already made up his mind because of his past experiences with the template cases or, putting the same matter differently, because of his mind-set he would not be in a position to consider all potentially relevant arguments. That in turn might lead to the proposition that his perception had been "warped" in some way, in other words by past dealings with Mr Russell in the long history of the litigation which has been before the Authority.[744]

Mr Russell's position was essentially reduced to the contention that there must necessarily be a reasonable apprehension of bias, because, over a course of many years, the Judge had consistently held against various objectors (in the template cases) and in favour of the Commissioner. In an earlier Court of Appeal decision *Miller v Commissioner of Inland Revenue*,[745] Richardson J referred to the "turgid history and the continuing saga of the numerous cases involving Mr Russell and his various clients."[746]

The question was, whether by dint of such a long association, and the track record of consistent findings in favour of the Commissioner, a fair minded lay observer might consider that *for those reasons* the Judge might not bring an impartial mind to the resolution of Mr Russell's case.

---

[742] *Russell v Taxation Review Authority*, above n 585, at [60]. Mr Russell claimed inter alia that the Authority had made a final decision in *Case R25*, above n 48 when it had promised an interim decision, and that there were about 50 more days of evidence which should have been called, wrong witnesses were put forward by the Commissioner, the evidence of witnesses had been curtailed, the Authority had shown a disposition to accept the Commissioner's views, showing a predisposition to reject or ignore the taxpayer's views, that the Authority had made findings contrary to the evidence, and that issues had been determined before hearing evidence.

[743] *Muir v Commissioner of Inland Revenue*, above n 721, at [64].

[744] *Russell v Taxation Review Authority*, above n 585, at [88].

[745] *Miller v Commissioner of Inland Revenue* [1995] 3 NZLR 664 (CA).

[746] At 667.

Cooper J in the High Court[747] referred to the United States jurisprudence[748] on judicial disqualification some of which had been discussed in *Muir*[749] in the Court of Appeal.

Every ruling on an arguable point will necessarily favour one party to the litigation or the other. In some cases in the United States it has been argued that a disproportionate number of rulings against one party may suggest that something untoward has motivated them. A party to the litigation may hold a subjective perception that the Judge's perceived tendency to rule against them is inevitably suspect. It was held in *Phillips v Joint Legis. Comm. On Performance and Expend. Review* that:[750]

> a Judge must be free to make rulings on the merits without the apprehension that, should she make a disproportionate number of rulings in favour of one party, she would thereby have created the impression of bias toward that party or against its adversary.

Likewise, in *Massachusetts School of Law v American Bar Association*[751] it was said that "even-handed justice does not require a Judge to balance numerically the rulings in favour of and against each party", and that it was quite possible that a Judge's consistent pattern of ruling against a party could be entirely justified by the fact that the party has consistently taken positions that cannot be supported. On the basis of these cases and other cases referred to, Flamm concludes:[752]

> Thus, the mere fact that a judge has issued rulings that a party perceives to be unfavourable to its cause is usually insufficient to establish disqualifying bias, even when the number of such unfavourable rulings is on a statistical basis extremely high or possibly suggestive of a pattern. The same is true when the unfavourable rulings are directed toward a party's counsel rather than the party itself. An Appeals Court is particularly unlikely to find that rulings are indicative of disqualifying bias when they were upheld on appeal.

Flamm also discusses cases where it was alleged that a Judge was biased against a party because of adverse comments made. Flamm concludes on the basis of the authorities discussed that critical comments will generally not be regarded as disqualifying as long as they do not demonstrate the Judge has formed an opinion with regard to the ultimate merits of a matter pending before the Court.

---

[747] *Russell v Taxation Review Authority*, above n 585, at [90].

[748] For more on this topic see Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* (2nd ed., Banks and Jordan Publishing Company, Boston, 2007).

[749] *Muir v Commissioner of Inland Revenue*, above n 721.

[750] *Russell v Taxation Review Authority*, above n 585, at [93] referring to *Phillips v Joint Legis. Comm. On Performance and Expenditure Review* (1981) 637 F.2d 1014 (5th circuit 1981).

[751] *Massachusetts School of Law v American Bar Association* (1997) 107 F 3d 1026 (3rd circuit 1997) at 1043.

[752] Flamm, above n 748, at 449-450.

Although the Authority had made observations in *Case R25*[753] about Mr Russell's obsession with tax saving, leading to a mental block about tax avoidance schemes, there had been no adverse finding about Mr Russell's credibility as a witness. Cooper J concluded that while the Authority disagreed with the effect of the various schemes in which Mr Russell had been involved, the difference of opinion was as to the legal consequences of those arrangements and his Honour had not been referred to any finding of the Judge that Mr Russell was untruthful.

His Honour considered the adverse comments made about Mr Russell were to be regarded as legitimate judicial responses to the nature of the litigation with which the Authority has had to deal, and Mr Russell's part in it.[754] His Honour considered it germane to refer to an affidavit of Mr Russell of 14 September 2005:[755]

> I wish to make clear that by bringing these judicial review proceedings I do not intend any slight on the character of Judge Barber or on his integrity as a Judge. As a lay advocate I have been greatly assisted by Judge Barber in the conduct of the cases and am grateful for such help over many years.

In respect to the appearance of bias his Honour considered the second sentence quoted above of most significance, as it stated that the Judge had over a long period adopted a helpful stance in his dealings with Mr Russell. Cooper J recognised that care was necessary when considering the United States jurisprudence in this field, and recognised that although the test set out in *Liteky v United States*[756] was not the same as that which the Court of Appeal had described in *Muir*[757], the tests were not in fact far apart. Both were broadly similar to the revised *Guide to Judicial Conduct*[758] where it states 'the ultimate issue is whether a fair minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the case'.[759]

His Honour concluded that the position apparently adopted in the United States was that there cannot be reasonable questions about a Judge's impartiality arising simply from his or her determination of cases even if there is a consistent pattern of holding against one party. Cooper J was persuaded that was the appropriate conclusion and any different approach, by which it could be inferred from such a pattern alone that the Judge may be biased, would sit uncomfortably alongside

---

[753] *Case R25*, above n 48.

[754] *Russell v Taxation Review Authority*, above n 585, at [96].

[755] At [24].

[756] *Liteky v United States* 510 US 540 (1994).

[757] *Muir v Commissioner of Inland Revenue*, above n 721.

[758] Council of the Chief Justices of Australia, *Guide to Judicial Conduct* (2nd ed, Melbourne, Australasian Institute of Judicial Administration, 2007).

[759] At 11.

the judicial oath.[760] Any suggestion that litigants deserve equal treatment in terms of outcome would be directly contrary to the core value that cases must be decided in accordance with the law.

In his Honour's view, a legal principle that there might be a reasonable apprehension of bias arising from the fact that the Authority had consistently upheld the position of the Commissioner in the various cases that had come before it involving Mr Russell would be fundamentally wrong. There could not be presumptive bias where the rulings of the Judge, although adverse to a party's interests, have nevertheless been consistently in accordance with the law. Put simply, there is a duty to decide cases in accordance with the law, and compliance with that duty cannot give rise to a reasonable apprehension of bias. The notional fair minded lay observer must be assumed to know that much about the role of a Judge.[761]

Mr Russell appealed to the Court of Appeal in *Russell v Taxation Review Authority*.[762] The 'Appellant's list of issues' is on the following page. Mr Russell throws the "bias ball"[763] in the air as well as referring to the BORA and s 6 of the TAA 1994.

> I throw the Bill of Rights and s 6 [TAA 1994] in all my cases...I argue it in every one...I raise it as an objection...so they have got to consider it...then I can cross examine them on it...some of them don't even know the section [s 27 BORA]...don't know what it says...they have never looked at it...they have no idea...it's being considered now in tax cases and in my cases because I am raising it all the time.[764]

[760] In all common law jurisdictions, a judge takes an oath on appointment. The New Zealand Oaths and Declarations Act 1957 section 18 Judicial Oath states: 'I will do right to all manner of people after the laws and usages of New Zealand *without fear or favour, affection or ill will*. So help me God'. (Emphasis added).

[761] *Russell v Taxation Review Authority*, above n 585, at [101].

[762] *Russell v Taxation Review Authority* [2011] NZCA 158, [2011] NZAR 310 (CA), [2011] 25 NZTC 20,044 (CA). Mr Russell had initially lodged an appeal against the judgment of Cooper J addressing the recusal issue on 5 February 2009. This hearing was delayed for various reasons. It was due to be heard on 5 August 2010; however, Mr Russell applied for an adjournment as he was unwell and required surgery.

[763] *Russell v Taxation Review Authority*, above n 585, at [57].

[764] Interview with Mr JG Russell, above n 156.

APPELLANT'S LIST OF ISSUES

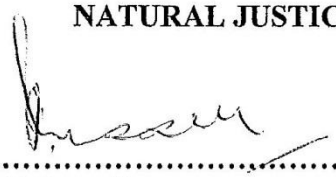
MAY IT PLEASE THE COURT

This is the list of issues as the Appellant perceives them to be for the hearing to take place on 8th March 2011:

1. **IS IT LIKELY THAT THE JUDGE MIGHT BE PERCEIVED TO BE BIASED AS A CONSEQUENCE OF:**
   a) Having adjudicated on more than 70 cases involving the Appellant over more than 20 years.
   b) Making comments over many years showing firmly held and fixed views about the Appellant and his conduct.
   c) Having conducted the hearings in the earlier cases in a manner which the Appellant claims shows prejudgment and bias.

2. **DOES SECTION 6 OF THE TAX ADMINISTRATION ACT 1994 REINFORCE THE REQUIREMENT THAT THE JUDGE BE IMPARTIAL AND UNBIASED?**

3. **DOES THE BILL OF RIGHTS REINFORCE THE REQUIREMENT THAT THE JUDGE BE IMPARTIAL UNBIASED AND PROVIDE NATURAL JUSTICE?**



.....

J G Russell
Appellant

The Court of Appeal acknowledged that there was a basis for the taxpayer's objection to Judge Barber rehearing the case, but it did not need to decide whether the Judge should have recused himself because of the view it took, that any basis for challenge had been overtaken by the High Court rehearing of the merits of the challenge to the tax assessment. There was no question of the decision of Wylie J being tainted by bias as there was no such allegation made against him, and the facts applied were established by agreement. Therefore, the question whether Judge Barber should have recused himself was treated by the Court of Appeal as moot.[765] The Supreme Court[766] gave the final word on this issue rather succinctly, declaring that in the circumstances, the Court of Appeal was correct to regard any taint as overtaken by the substantive appeal.[767]

[redacted][768]

[redacted][769]

[redacted]

[765] *Russell v Taxation Review Authority*, above n 762, at 25, 361.

[766] *Russell v Taxation Review Authority* [2011] NZSC 96, (2011) 25 NZTC 20,077.

[767] At [5].

[768] [redacted]

[769] [redacted]

Chapter X
Discussion

X Discussion:

"…the distinction between tax mitigation and tax avoidance is unhelpful: as the judge pithily said, it 'describes a conclusion rather than providing a signpost to it'"[770]

A Introduction

At first glance it is difficult to see substantial contribution to New Zealand jurisprudence as a result of the swathes of Russell template related litigation. There is no doubt that Mr Russell is an outstandingly clever individual. This is demonstrated by his successful earlier career as a management accountant and the initial success of Securitibank. [redacted] Mr Russell, it would appear, implemented his tax template in a time where the pendulum was swinging away from the *Duke of Westminster*[771] [redacted] It is important to note that when the template was designed and promoted this was in a 'pre-*Challenge*'[772] era. On closer review this section summarises some of the impacts Mr Russell and his related litigation has made in the New Zealand tax jurisprudence landscape.

1 In the 'eyes of the beholder'

The 'concept' of tax avoidance is at the heart of the entire Russell template-related litigation. Although tax avoidance cases appearing before the courts are often clever and well designed, the pendulum of what is acceptable appears to have swung in the Commissioner's favour in more recent years. With promoter penalties[773] now contained in the tax legislation it would be unlikely any tax advisor would promote a tax arrangement pushing the acceptable boundaries too far without first seeking a ruling or having considered the avoidance challenge possibilities.

In the concluding stages of this thesis it is important to make some observations. Although it would be easy to dismiss Mr Russell as a serial tax avoider, this stance may be somewhat premature on a certain level. The Privy Council[774] ruled the Russell tax template was tax avoidance and this is not disputed. [redacted] Although many did not 'flock' to the template one would wonder whether Mr Russell ever thought he (and his template) would be regarded as such a risk to the New Zealand tax base.

---

[770] *O'Neil v Commissioner of Inland Revenue*, above n 2, per Lord Hoffman at [9].

[771] *Inland Revenue Commissioners v Duke of Westminster*, above n 215.

[772] *Challenge Corporation Ltd v Commissioner of Inland Revenue*, above n 49.

[773] Section 141EB [Promoter Penalties] TAA 1994.

[774] *O'Neil v Commissioner of Inland Revenue*, above n 2.

Mr Russell does not appear to be attracted to the gains financially but appears to be driven by an earnest belief that he has done no wrong. He maintains in interview after interview in the media that "To my dying day, I will always maintain that the courts have got it wrong."[775] Mr Russell has also spent an alleged $5 million in defending his views. If he did not hold a genuine belief in his tax stance one would think he would have walked away years ago.

He perhaps has wanted exoneration that the template, designed in a 'pre-*Challenge*'[776] era, was both inherently clever by design and perhaps justified by the attitudes of the day. This is supported by the comments from the *Challenge* case where the sales of existing tax losses were initially approved by Inland Revenue. The *Challenge* transaction, where $10,000 plus half the tax benefits was the "going rate at the time", would clearly signal a different tax environment then to the tax environment post-*Ben Nevis.*[777]

What has Mr Russell and his tax template taught us? It has shown the tenacity and creativity of Mr Russell in designing a tax template with aspects of it that are still being litigated 30 years later. The substantive tax issue was firmly dealt with in 2001;[778] however, the on-going matters still roll on. [redacted] There really are no 'winners' in relation to the template litigation. Mr Russell's cases were heard in the Privy Council on two occasions but if he had been granted leave no doubt he would have attended at least once more.[779]

[775] William Mace, "$138m tax bill appeal thrown out" *The Dominion Post*, (2nd ed., New Zealand, 21 April 2011) at 1.

[776] *Commissioner of Inland Revenue v Challenge Corporation Ltd*, above n 24.

[777] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 47.

[778] The New Zealand link with the Privy Council was broken in early 2004 with the establishment of the new Supreme Court of New Zealand. The Supreme Court of New Zealand formally came into existence on 1 January 2004 by the passing of the Supreme Court Act 2003 on 15 October 2003. The court first sat on 1 July 2004. It replaced the right of appeal to the Judicial Committee of the Privy Council based in London.

[779] Special leave to appeal was refused by the Privy Council in 2002 in *Russell v Taxation Review Authority* (2002) 20 NZTC 17,832 (HC) and *Wetherill Company Ltd v Taxation Review Authority* (2001) 20 NZTC 17,166 (HC) and *M and J Wetherill Company Ltd v Taxation Review Authority* (2002) 20 NZTC 17,681 (CA) 2 October 2002, Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (UK). The petitioners in the *Russell* application argued that there had been a denial of a right to hear an argument relating to an alleged "vendetta" against the petitioners, that there were deficiencies in the TRA's process, that the High Court should have exercised discretion in the petitioner's favour and that there was bias in the Court of Appeal. The Privy Council does not provide a written decision in applications for special leave.

B Impact on New Zealand jurisprudence

[redacted][780]

This thesis never sought to discuss the merits of the Russell tax template from an avoidance perspective. Judge Barber agreed with Mr Bruce Grierson's submission in *Case M109*[781] that the transaction was "commercially ingenious", but rejected his submission that it was "commercially realistic."[782] Another judge once said that if the Russell tax template was held not to be tax avoidance it would be hard to imagine what would be regarded as being tax avoidance. Mr Russell simply has a different perspective.

From the formation of the so-called Russell Team in 1994 to the current litigation surrounding 'Track E', the many hours of investigators time, lawyers, Crown Counsel as well as judicial time, has been immense. It has been estimated that Inland Revenue has spent $30 million on the Russell related matters. [redacted]

One 'constant' throughout the whole Russell litigation story is the involvement of Mr Mike Ruffin. Mr Ruffin was a lawyer with Meredith Connell in Auckland and latterly is a Barrister acting on his own account. Mr Ruffin was one of the legal representatives for the Commissioner in the 'pre-template' *Case K28*[783] in 1988. [redacted][784]

[redacted]

[redacted]

[780] [redacted]

[781] *Case M109*, above n 248.

[782] At 2.

[783] *Case K28*, above n 317.

[784] [redacted]

1 Section 99: "This section is indeed a tax collector's dream"[785]

I noted that in the first paragraph of *Case R25*[786] Judge Barber refers to s 99(2)[787] and (3)[788] ITA 1976. Some 18 years later these sections are still being discussed in relation to the Russell litigation. [redacted] If the Russell template transaction has proved one thing; it is the breadth of the powers of reconstruction under s 99(3) ITA 1976. Section 99(3) says that the Commissioner shall adjust the assessable income of *any* person affected by the arrangement to counteract *any* tax advantage that person obtained. (emphasis added). In *O'Neil v Commissioner of Inland Revenue*[789] with respect to assessing the shareholders under 'Track B' Lord Hoffman states that:[790]

> …provided that he was not using inconsistent hypotheses for his reconstructions, he was in their Lordships' opinion entitled to assess any party who had obtained a tax advantage.

Mr Russell had argued in the 'Track E' High Court litigation that he did not receive "a single cent" of the income that was assessed to him and that it was wrong for the Commissioner to reconstruct the income of the Commercial Management Partnership to him.[791] It was further submitted that the Commissioner's statutory powers to reconstruct tax avoidance arrangements did not extend to permit him to include income earned by a company in the personal assessment of a company director, when the income was not received by the director in any form. The facts did show that the income was earned by the partnerships and not by Mr Russell personally.

Mr Russell did not contest that the arrangement by which six Commercial Management Partner companies diverted their income to loss companies amounted to tax avoidance but he did contest that his personal relationship with the companies as a director was part of the tax avoidance arrangement. In his view there was no legal basis for lifting the corporate veil to assess income to Mr Russell as a director only because he was a director.

In the High Court[792] it was held that there was one overall arrangement and that Mr Russell controlled everything. He was the 'architect' and each of the parties involved, starting with Mr Russell and finishing with Mr Russell, had the expectation that the others would act in a particular

---

[785] *Miller v Commissioner of Inland Revenue*, above n 142, at [229].

[786] *Case R25*, above n 48, at [1].

[787] Section 99(2) [Void arrangements].

[788] Section 99(3) [Adjustment of income].

[789] *O'Neil v Commissioner of Inland Revenue*, above n 2.

[790] At [31].

[791] *Russell v Commissioner of Inland Revenue*, above n 35, at [75].

[792] At [101].

way because all of their actions were orchestrated by Mr Russell. The partner and loss companies derived no benefit from the arrangement, taking no independent role in the overall plan. They were 'functionaries that acted at Mr Russell's behest.'[793]

Mr Russell used legitimate corporate and trust structures and the Commissioner did not challenge their legitimacy. Rather, he challenged the way the structures were applied. Wylie J agreed with the earlier TRA decision[794] that an unrestricted transfer of profits to loss companies included in a group purely because of the losses they brought with them in the manner sought to be achieved would bypass the company grouping rules contained in the legislation, and significantly undermine the tax base. This clearly could not have been Parliament's intention.

Although it was argued that Mr Russell did not receive 'a dollar' from the arrangement either directly or indirectly, it is clear that this was not the test from the Russell 'Track E' litigation. Wylie J held that Mr Russell *was* a person affected by the arrangement through obtaining a 'tax advantage' from it. Although it was accepted that Mr Russell did not receive any of the income generated from the arrangement that was its *purpose*, to ensure that he did not have to pay tax on that income. It was therefore open to the Commissioner to reconstruct Mr Russell's assessable income to counteract the tax advantage obtained by him. An arrangement can be clearly carried out by one person.

The Commissioner's power to reconstruct is not fettered. Section GA 1(6) [No double counting] provides that the Commissioner cannot ultimately include an amount of income (or deduction) in the taxable income of more than one person. A predecessor to s GA 1(6) was considered in *Miller v Commissioner of Inland Revenue*[795] where Blanchard J stated in relation to reconstruction that:[796]

> It is not necessary on each occasion when the Commissioner makes an assessment of one taxpayer which is inconsistent with his earlier assessment of a different taxpayer that he simultaneously should amend that earlier assessment. That must ultimately be done or the Commissioner would, in effect, be collecting the same tax twice over, but he is to be allowed some flexibility in the timing of the adjustment to meet administrative demands and to enable him to await the outcome of objection proceedings in relation to the assessments.

From a time bar perspective *O'Neil v Commissioner of Inland Revenue*[797] has clarified that if a taxpayer has entered into a tax avoidance arrangement and failed to account for the income avoided by the arrangement, the Commissioner can assess the taxpayer for the unreturned income relying on

[793] At [102].

[794] *Case Z19*, above n 442.

[795] *Miller v Commissioner of Inland Revenue*, above n 487.

[796] At 13,973.

[797] *O'Neil v Commissioner of Inland Revenue*, above n 2.

s 108(2) (b) TAA 1994. In *O'Neil v Commissioner of Inland Revenue*[798] Mr Judd submitted that the appellant's returns did not altogether omit mention of income of the nature or from the source in respect of which they were being assessed under s 99 ITA 1976. Their Lordships considered this argument based upon a misapprehension about the effect of reconstruction.[799]

Section 99 was considered sufficient to counteract Mr Russell's template right from the start, although the following exchange is interesting in relation to remedial legislation. [redacted][800] [redacted]"[801] [redacted]

[redacted][802] [redacted]

Mr Russell has claimed on many occasions that he considers income derived has been taxed in some cases three times over, in other words challenging the proper use of s 99. In 2006 Mr Russell sought to have 20 struck-off companies reinstated to the Companies Office Register so that he could pursue legal action against Inland Revenue in relation to double taxation.[803]

2 The interaction of the specific and general provisions

[redacted][804] [redacted] In *Miller v Commissioner of Inland Revenue; Managed Fashions Ltd v Commissioner of Inland Revenue*[805] there was discussion of whether the general anti-avoidance

[798] At [21].

[799] At [22].

[800] [redacted]

[801] [redacted]

[802] [redacted]

[803] Kelly Sinoski, "Russell fights to sue IRD" *The Independent* (Auckland, 10 May 2006) at 4.

[804] [redacted]

[805] *Miller v Commissioner of Inland Revenue*, above n 487, at 13,977.

provision can apply when the specific provision does actually apply as well, to alter the tax position that would otherwise be reached. Mr Grierson, counsel in *Miller*[806] did not pursue the argument that the specific provision in s 191(7C) ITA 1976 actually applied. The Court's reasoning in *Miller* on this point was purely obiter. The Court of Appeal did indicate that the specific and general anti-avoidance provision could apply at the same time to the arrangement. Coleman[807] writes that there have been no decisions of the courts since the *Miller*[808]decision dealing explicitly with the interaction between the general and a specific anti-avoidance provision, where the specific provision actually applies to change the tax consequences of the transaction.[809] Coleman provides some light on this by stating an example. If s GB 8 ITA 2007 [Arrangements involving attributed repatriation from CFCs] applied to an arrangement, could the Commissioner also apply the general anti-avoidance provision so as to make a larger adjustment against the taxpayer? In Coleman's opinion the answer would be no.[810]

3 Procedural 'increments'

Procedurally Mr Russell has also had an impact. Mr Russell has challenged almost every move made towards him by Inland Revenue. He has challenged the privilege status of file notes found in a car park pertaining to his case, whether Inland Revenue in-house solicitors holding practising certificates were entitled to claim legal professional privilege,[811] and is perhaps the first to allege vendetta on behalf of the Commissioner, even to the extent of wishing to subpoena the Commissioner himself.

[redacted] In *FB Duvall Ltd v Commissioner of Inland Revenue*[812] Ellis J upheld the right of participants in the Russell template to have late objections regarding GST assessments made 15 years earlier reconsidered by the Commissioner. Her Honour accepted that the taxpayer's delay in filing their objection was understandable as they had been waiting for the outcome of on-going litigation regarding the template arrangement. The Commissioner was prevented from focusing on

[806] *Miller v Commissioner of Inland Revenue*, above n 487.

[807] J. Coleman, *Tax Avoidance Law in New Zealand*, (CCH New Zealand Ltd, Auckland, 2009).

[808] *Miller v Commissioner of Inland Revenue*, above n 487, at 13,977 and 13,978.

[809] Coleman, above n 807, at 43.

[810] At 43. Coleman states that if a specific anti-avoidance provision actually applies to the facts of the case that provision ought to be applied rather than the general one. The Supreme Court has endorsed an approach that looks at Parliament's purpose in enacting a particular provision. The maxim generalia specialibus non derogant is but an example of the scheme and purpose analysis. It is likely that a court will not permit a larger adjustment to be made against a taxpayer under the general anti-avoidance provision when a smaller one would be directed under the applicable specific anti-avoidance provision.

[811] *Miller v Commissioner of Inland Revenue*, above n 142.

[812] *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52.

the lateness of the taxpayer's objection but had to consider its merits. The Commissioner could not use the excuse of lengthy delay to justify refusing to do so.

Mr Russell has received an astonishing number of s 17 TAA 1994 information requests. It is not surprising that the Commissioner's powers to obtain information have also been subject to challenge by him. In *Russell v Latimer*[813] Mr Russell argued that it was improper for the Commissioner to use s 17 IRDA 1974 to request information that did not relate to an already identified issue regarding a named taxpayer. The High Court in *Russell v Latimer* confirmed that the Commissioner has the authority to make general enquiries to ensure compliance with the Revenue Acts. With regard to the 226 informations for failure to comply with s 17 notices, one may think this volume or request to be burdensome. Again in *Russell v Latimer*[814] the court rejected this ground, so the fact that it is onerous to provide the information does not alleviate the obligation to provide it.

Mr Russell's procedural success as a result of "good luck more than anything else"[815] is highlighted in *Commissioner of Inland Revenue v Russell*.[816] Mr Russell by 'sheer luck' during cross examination of Mrs Denise Latimer challenged her authority to issue the informations. It was found that indeed Mrs Latimer lacked the correct delegation. In *Commissioner of Inland Revenue v Russell*[817] Judge Barber held that in his view the particular proceedings were "a nullity and that cannot be overcome."[818] Keating[819] states that "the Russell case demonstrates that a lack of delegation by the IRD officer can be a complete answer to an assessment or prosecution."[820] Actions by Inland Revenue officers without the necessary delegation is also demonstrated in the Russell related *Kemp*[821] litigation where a concluded settlement with a number of taxpayers was overturned once it became apparent that Ministerial approval was required for settlement, and the respective Inland Revenue staff did not have the necessary delegation to enter into the settlement arrangements with the taxpayers.

The Commissioner has tremendous information collecting powers and again it is a Russell related case *Miller v Commissioner of Inland Revenue*[822] that would suggest it is legitimate for the

---

[813] *Russell v Latimer*, above n 356.

[814] *Russell v Latimer*, above n 356.

[815] Interview with Mr JG Russell, above n 156.

[816] *Commissioner of Inland Revenue v Russell*, above n 685.

[817] At [65].

[818] *Russell v Latimer*, above n 356, at [65].

[819] Keating, above n 636.

[820] At 259.

[821] *Kemp v Commissioner of Inland Revenue*, above n 650.

[822] *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,127 (HC).

Commissioner to exercise his powers under ss 16, 17 or 19 TAA 1994 with a view to place himself in a good position for litigation, at least before the litigation commences.

Legal privilege issues were challenged with various minutes of the Russell Team meetings. Mr Russell often felt that correspondence was claimed as being legally privileged when it was not. The Russell Team meetings would no doubt discuss strategy issues and again Russell related litigation provides some guidance on this point.[823] Legal professional privilege applies only to legal advice and does not extend to strategy meetings or general decision making. This was confirmed in *Miller v Commissioner of Inland Revenue*[824] where a memorandum recording the decision to invoke s 99 ITA 1976 prepared by an Inland Revenue officer (who was a practising solicitor) had to be disclosed to the taxpayer. The memorandum purely recorded the administrative decision leading up to the assessment and did not purport to provide any legal advice.

The *Dandelion*[825] case where Mr Russell was acting purely as a tax agent also confirms a legal point, that even if there is actual prejudice by an assessing Inland Revenue officer, this could be cured by a *de novo* hearing provided to a taxpayer under the statutory procedure and did not generally warrant vitiating an assessment.

Mr Russell has thrown the 'bias ball' in the air with regard to Judge Barber and recusal from the 'Track E' litigation and it comes as no surprise that apparent bias has been discussed in earlier cases. In *Russell v Taxation Review Authority*[826] the Court of Appeal confirmed the validity of tax assessments despite apparent bias stating:[827]

> But, even if it is assumed that the Commissioner did have a dislike of Mr Russell which might have inclined him to look for an opportunity of assessing Mr Russell's clients, that would be of no continuing relevance if, in the end, the Commissioner made his assessments in due time and in accordance with the law and to the best of his judgment.

[823] *Miller v Commissioner of Inland Revenue*, above n 142.

[824] At 13,001.

[825] *Case U11*, above n 293; *Commissioner of Inland Revenue v Dandelion Investments Ltd*, above n 329; *Dandelion Investments Ltd v Commissioner of Inland Revenue*, above n 329.

[826] *Russell v Taxation Review Authority* (2001) 20 NZTC 17,418 (CA).

[827] At [9].

4 Assessment

The *Paul Finance*[828] litigation raised some valid points. Firstly, that a computer generated assessment that 'got away from the mailroom', lacked the necessary exercise of judgment by the Commissioner to qualify as a valid assessment.[829] In this case the assessment and cheque were issued in error. It was also acknowledged in this case[830] that an assessment can often only be tentative, yet remain a valid assessment provided it is the best estimate based on information available at hand. [redacted][831] [redacted]

Mr Russell (and the template-related litigation) has challenged whether compliance with the Commissioner's Policy Statement (CPS) on section 99[832] by Inland Revenue staff was required for the making of a valid assessment. Baragwanath J's approach to the CPS was stated in *Miller v Commissioner of Inland Revenue*:[833]

> I do not accept the Crown's main argument – that Departmental staff could simply ignore the policy statement as not binding. Whether as Mr Grierson argues it provides a fetter on their authority, or whether it should be construed as giving rise to a legitimate expectation which should be given effect by the Courts…the result is the same: the directive must be complied with. It does not impose an improper fetter on the exercise of the s 99(3) and s 23 functions but directs how they are performed.

The issue of whether compliance with the CPS was required for the making of a valid assessment invoking s 99 was authoritatively determined in *O'Neil v Commissioner of Inland Revenue*.[834] Lord Hoffman, delivering the judgment of the Privy Council, refers to the CPS setting out what he regarded as its proper scope. His Lordship said:[835]

> It is relevant to observe that the question of whether an arrangement is void against the Commissioner under s 99(2) is not a matter for his discretion or policy. The Act says that an arrangement falling within the terms of the section 'shall be absolutely void'. Likewise, the Commissioner is under a statutory duty to reassess the taxpayer's assessable income to counteract any tax advantage. Discretion enters into the matter only as to the method of calculation by which the Commissioner discharges that duty.

---

828 *Paul Finance Ltd v Commissioner of Inland Revenue* (1995) 17 NZTC 12,379 (CA).

829 *Paul Finance Ltd v Commissioner of Inland Revenue*, above n 828.

830 At 12,382.

831 [redacted]

832 "Commissioner's Policy Statement on Section 99", *IRD Tax Information Bulletin*, Vol. 1, No. 8, Appendix C, (Feb. 1990) at 1-17.

833 *Miller v Commissioner of Inland Revenue*, above n 142, at 13,048.

834 *O'Neil v Commissioner of Inland Revenue*, above n 2.

835 At 17,059.

At 17,060 Lord Hoffman considered a submission advanced by the appellant that an assessment under delegated powers must be *ultra vires* if the thorough analysis promised by the CPS had not been undertaken. On that submission his Lordship said:[836]

> A more fundamental point is that their Lordships do not think that the CPS was intended to lay down conditions at all. They do not consider that the parts of the document relied upon by the appellants do more than to reassure the public that the Commissioner and his officers will think very carefully about whether s 99 applies to any particular case. But his statutory duty is to reassess the taxpayer in any case in which s 99 applies and this duty cannot be made subject to internal conditions. Nor do their Lordships think that he intended to restrict his duty in such a way.

It is clear from Lord Hoffman's statement that the proper approach to the CPS has been determined. Compliance with the CPS (or Interpretation Statements) cannot be regarded as a condition precedent to the issue of a valid assessment.[837] Although there is now the Parliamentary Contemplation test post *Ben Nevis*, and what appears to be a very comprehensive discussion document released by Inland Revenue on tax avoidance and the interpretation of ss BG1 and GA 1 ITA 2007, the status of such a statement or guideline will not be held to restrict the Commissioner's duty in any way to reassess a taxpayer under s BG 1 ITA 2007. Although internal statements are not binding on the courts or on the Commissioner, Coleman makes the point that "as a matter of practice any published statement by the Commissioner is binding on his or her staff by virtue of their employment obligations."[838]

[redacted][839]

[redacted]

[836] At [26].

[837] *Commissioner of Inland Revenue v Dandelion Investments Ltd*, above n 329, at [50] per Tompkins J.

[838] Coleman, above n 807, 25.

[839] [redacted]

[redacted]

[redacted][840]

[redacted]

[redacted][841] Mr Russell has never let go of the CPS issue. In *O'Neil v Commissioner of Inland Revenue*[842] the Privy Council dismissed a judicial review application that alleged an assessment was invalid because the Commissioner had failed to adhere to his published policy on tax avoidance. Lord Hoffman stated that "it would only be in exceptional cases that judicial review should be granted where challenges can be addressed in the statutory objection procedure."[843]

5 Settlement

The *Kemp*[844] litigation, where initially it would be easy to think that Inland Revenue had inappropriately resiled on concluded settlements, raises an interesting settlement point. In *Accent Management Ltd v Commissioner of Inland Revenue*[845] taxpayers who had continued with litigation (and lost) were not offered terms made available to the taxpayers that had previously settled. This can be contrasted with *Miller v Commissioner of Inland Revenue*[846] where the Commissioner was explicitly directed to extend the benefits of the settlement reached by some taxpayers earlier to those that had previously rejected the settlement.

All of the taxpayers had entered into a settlement offered by the Commissioner, which the High Court subsequently ruled to be *ultra vires* in *Kemp v Commissioner of Inland Revenue*.[847] Most taxpayers entered into new, less favourable settlements. Other taxpayers litigated and subsequently lost. The Court of Appeal thought these taxpayers should nevertheless be offered the opportunity to

---

[840] [redacted]

[841] [redacted]

[842] *O'Neil v Commissioner of Inland Revenue*, above n 2.

[843] At [18].

[844] *Kemp v Commissioner of Inland Revenue*, above n 650.

[845] *Accent Management Ltd v Commissioner of Inland Revenue* [2007], above n 136.

[846] *Miller v Commissioner of Inland Revenue* (2002) 20 NZTC 17,826 (CA).

[847] *Kemp v Commissioner of Inland Revenue*, above n 650.

avail themselves of the settlement they had previously rejected. Although there were no explanations provided for this opportunity being extended to these taxpayers, one may wonder if the court simply wanted to bring an end to the matter, bearing in mind the particular circumstances of the *Kemp* settlements.

6 A non-tax jurisprudential contribution

From a non-tax jurisprudence perspective, yet related to Mr Russell by way of the Securitibank relationship, Harley regards the judgment given by Richardson J in *Re Securitibank (No 2)*[848] as one of the most important his Honour has delivered in the Court, stating that "it reflects foundations that have been repeated in his subsequent judgments."[849]

Shortly after Richardson J was appointed a Judge in the Court of Appeal, two differently composed courts heard the appeals in *Re Securitibank (No 2)* and *Buckley & Young v Commissioner of Inland Revenue*.[850] Richardson J delivered the judgment for the Court of Appeal in *Buckley & Young* on the same day as judgment was given in *Re Securitibank*. The judgments in both cases referred to a number of the same authorities; however neither decision referred to the other.

Harley writes that "the Court itself has referred to the Richardson *Re Securitibank (No 2)* judgment in numerous other decisions"[851] that have followed. He considers the decision "reflects a strong adherence to precedent and also a strong appreciation of the economic costs of uncertainty in law, as it affects commercial life."[852] The argument presented would have required the court to disregard the separate legal existence of two Securitibank group companies, Merbank and Commercial Bills. Richardson J explained why, in his opinion it was so important to accept the separate entity theory on which the *Salomon*[853] doctrine rests. His Honour reinforcing the conclusion said:[854]

> One is that the approach contended for would, I believe, create undesirable uncertainty as to the application of our law. Commercial men are surely entitled to order their affairs to achieve the legal and lawful results which they intend. If they deliberately enter into a genuine commercial transaction intended to operate according to its tenor, what they ask of the law is assurance, the certainty that their intentions will be recognised.

---

848 *Re Securitibank Ltd (No 2)*, above n 495. At issue was whether client bills constituted loan transactions in contravention of the Moneylenders Act 1908.

849 Geoff Harley, "Collecting Taxes" (2002) 33 (3) VUWLR 333 at 350.

850 *Buckley & Young Ltd v Commissioner of Inland Revenue*, above n 504.

851 By way of example *Mills v Dowdall* [1983] NZLR 154 (CA) and *WT Ramsay Ltd v Inland Revenue Commissioners*, above n 218.

852 Harley, above n 849, at 350.

853 *Salomon v Salomon & Co Ltd*, above n 197. See also *Lee v Lee's Air Farming Ltd*, above n 198.

854 *Re Securitibank Ltd (No 2)*, above n 495, at 173.

C All Actions have Consequences

1 Frivolous or vexatious?

Some may consider Mr Russell's actions over the past few decades to be vexatious or frivolous. These two words are often placed together. Perhaps the number of Official Information requests sent by Mr Russell seeking essentially the same information but with enough variation to require Inland Revenue to answer the requests could be regarded as both.[855] [redacted]

This thesis has been very difficult from the perspective that so many cases argue very similar (or the same) points with the same (or similar) outcome. In *Case U23*[856] Judge Barber observed that:

> Regrettably, the objectors have been rather repetitive in terms of submissions and evidence... the objectors keep seeking to re-litigate matters which are res judicata…and appear to have a "clutching at straws" mentality…there is an atmosphere of the desperate hope of a miracle point materialising from nowhere for the objectors.

Wire Supplies Ltd v Commissioner of Inland Revenue,[857] a case not discussed in this thesis due to size constraints, in many ways sums up much of the litigation. Judge Barber's comments (above) in *Case U23* were referred to in the *Wire Supplies Ltd* case as follows:[858]

> [20] Those remarks were made in 1999. Now, nearly eight years later, we have before us numerous issues which have exactly the same hallmarks. Needless to say, the constant reiteration of the submissions rejected by courts at all levels does little to advance the cause of justice. Immediately after making the above remarks, Judge Barber said he thought the situation called out for mediation. We doubt that that is a realistic suggestion in the circumstances. Rather, in our view, it calls for proper restraint on the part of the taxpayers and their advisers and acceptance that repetition of failed arguments, sometimes with hair-splitting variations to the arguments as originally made, does nothing to make them more convincing.

---

[855] A frivolous action is regarded as not having any serious purpose or value. A vexatious action can denote an action brought without sufficient grounds for winning, purely to cause annoyance to the other party. Some of the defence issues raised in *Commissioner of Inland Revenue v Rupe* (2003) 21 NZTC 18,219 (DC) could be regarded as frivolous (such as claiming he had not been named properly). This point was also argued in *Boyton v Commissioner of Inland Revenue* (2002) 20 NZTC 17,615 (HC) where the taxpayer argued that his name had *sui juris* status.

[856] *Case U23*, above n 501, at [5].

[857] *Wire Supplies Ltd v Commissioner of Inland Revenue* [2007] NZCA 244, [2007] 3 NZLR 458.

[858] *Case U23*, above n 501, at [20] referred to in *Wire Supplies Ltd v Commissioner of Inland Revenue*, above n 857, at [20].

The amount of documents in the 'Track E' litigation provides an insight into the legal cost and expense, not to mention time involved. There were 289 folders of documents before the TRA in 'Track E' containing thousands of pages of information. One Inland Revenue senior officer, the 'architect' of 'Track E', Mr Phillip Blakeley, had a brief of evidence that was 349 pages long. Cross examination went into every aspect of the case in fine detail. The transcript of the cross-examination of Mr Russell alone ran to almost 500 pages. The notes of evidence in total comprised some 2,455 pages. The agreed statement of facts was 123 pages long.[859]

2 Use of money interest and issues of fairness

According to the Policy Advice Division of Inland Revenue "the [use of money interest] UOMI rates are a cornerstone of the tax compliance system in New Zealand."[860] Section 120A TAA 1994 sets out the purpose of the UOMI rules.[861] Parliament enacted the current UOMI rules in July 1996 applicable to all taxes and duties from the 1997/98 income year onwards. The Commentary on the Bill included the statement that the regime is not intended as a penalty, although it has sometimes been confused with such.

While on one level that is true, in other words the UOMI rules are a compensatory measure, concern was raised in 2008 by the Taxation Committee of the New Zealand Law Society (NZLS) and the National Tax Committee of the New Zealand Institute of Chartered Accountants (NZICA) to the Minister of Revenue, Hon Peter Dunne, reviewing the disputes resolution and challenge procedures in the TAA 1994. The two bodies noted that they had made the submission "because we both have serious concerns about the current procedures and believe changes are required urgently".[862] The two bodies drew attention to the implications that the UOMI rules have for disputes:[863]

> If there is a substantive dispute as to whether tax is due in the first place, and the taxpayer is unable to fund a voluntary payment of tax to stop the interest accruing, the UOMI regime gives rise to very serious financial risk for taxpayers (which must be reported in their accounts)…It is *taxpayers who are penalised for Inland Revenue's inefficiency* by way of an imposition of UOMI on underpaid tax at a very high rate. (emphasis added)

---

859 *Russell v Commissioner of Inland Revenue*, above n 35, at [7].

860 Inland Revenue, Special Report from Policy Advice Division, "Use-of-money interest rates and underpayment method rate changes", (23 June 2009) at 1 as cited in P. Vial, "Use of Money Interest: A Fair Deal for Taxpayers?" (November 2011) *Taxation Today* 22.

861 Section 120A TAA 1994.

862 Joint submission by the Taxation Committee of the New Zealand Law Society (NZLS) and National Tax Committee of the New Zealand Institute of Chartered Accountants (NZICA) on "The Disputes Resolution Procedures in Part 4A of the Tax Administration Act 1994 and the Challenge Procedures in Part 8A of the TAA 1994" (4 August 2008).

863 NZLS and NZICA joint submission to Inland Revenue on "Disputes: A Review – An Officials' Issues Paper" (July 2010; 3 September 2010) at 11.

Both the NZLS and NZICA believed that the UOMI regime is a factor in taxpayers deciding not to pursue disputable matters which is clearly not aligned with the original purpose of the disputes procedures regime. Their joint submission emphasised that the UOMI regime has become a penalty on taxpayers and requires review.[864]

Mr Russell's personal Statements of Account[865] show a marked increase in liability from 1997 year onwards and it is really a fiction to consider that Mr Russell would have the funds to clear this debt. A taxpayer looking at the growth of liability over the last two years in relation to Mr Russell would perhaps conclude that the UOMI rules are onerous. When the 'numbers' get large enough genuine attempts for debt settlement becomes meaningless. Presumably Inland Revenue are aware of the assets held by Mr Russell, or if not certainly should be after the years of investigation. They therefore have to realise they will not recover even a fraction of the outstanding amount.

[redacted]

It is clear from the cases looked at in this thesis that Inland Revenue have huge resources compared to most taxpayers. Mr Russell is a rare example of a taxpayer with considerable but not unlimited resources. His funding to fight Inland Revenue largely came from his income derived from the template. [redacted] This section states that:

> 'notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to –
>
> (a) the resources available to the Commissioner; and
> (b) the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and

[864] The NZLS and NZICA joint submission recommended that the Government consider either suspending the UOMI while the conference process (a phase of the disputes resolution procedures) continues; or imposing UOMI at a lower rate (for example the overpayment rate) during the disputes resolution process; or suspending UOMI if Inland Revenue fails to meet particular timeframes for response built into the disputes resolution procedures.

[865] Mr Russell's personal Statement of Account issued 17 August 2012 for an amount of $200,182,178.18.

(c) the compliance costs incurred by taxpayers.'

[redacted] UOMI is a cost to a taxpayer with an amendment to legislation enacted in August 2011 confirming deductibility.[866] [redacted]

Taxpayers can effectively become 'burnt off' and choose not to proceed with a tax dispute, choosing rather to settle and avoid the stress. This unfortunately is a problem with the tax disputes process. [redacted] In July 2010 the debt alleged was $138 million. By following legal avenues of dispute his personal tax debt now in late 2012 exceeds $200 million. [redacted]

[redacted] Mr Gary Judd, in written submissions in the 1989 case addressing receiver negligence *First City Corporation Ltd v Downsview Nominees Ltd (No. 2)*, found it necessary to say:[867]

> Mr Russell is clearly an unorthodox man who sometimes behaves in a manner which provokes antagonism, by insisting that things are done his way if he thinks that is the right way. Winning friends and influencing people by tactful persuasion is obviously not his style. He is, it is clear from the evidence before the Court, not hesitant to become involved in battles with public officials and others when he considers himself to be right.
>
> These characteristics whilst provoking irritation in those who have to suffer the consequences are not however the basis upon which Mr Russell's actions must be judged. He is entitled, like every citizen, to take advantage of his legal rights and be judged accordingly.

His Honour, Gault J agreed, stating:[868]

> It is, of course, quite correct that every citizen is entitled to take advantage of his legal rights and to take technical points if they are open, but if that course is adopted in the absence of true

[866] Deductibility of use of money interest, ss DB 3B, EF 4, EF 5, EF 6 ITA 2007. Section DB 3B ITA 2004, s DB 2 ITA 1994, and s 184AA TAA 1994. The amendment clarifies that UOMI is deductible for tax purposes. The amendments apply retrospectively from the 1997/1998 income year. The deductibility applies both to companies and individuals.

[867] *First City Corporation Ltd v Downsview Nominees Ltd*, above n 291, at 21.

[868] At 21.

> merit, little sympathy can be expected at the end of the day if the position taken proves to have been unjustified.

The question is of course, was Mr Russell's tax position taken over the last three decades justified? Mr Russell has taken the steps as he has seen fit to address the Inland Revenue claims, and quite within his legal rights to do so. The delay has not all been caused by his actions.

3 The big 'pot of gold'

[redacted][869][redacted] Many of the entities that have received various tax advantages have now been liquidated and cease to exist. The Russell Team itself has been long disbanded. The tax debt alleged has increased to a level beyond the bounds of reason for a person of Mr Russell's age to pay. The changes to the Compliance and Penalties Regime from the income years ended 31 March 1998 onwards introduced prospective changes to both the civil and criminal penalties[870] under the Inland Revenue Acts. The impact of the new regime is self-evident in its impact on Mr Russell's Statements of Account.

Mr Russell has stated that whether the Statement of Account indicated a final amount of $1 million or $1 billion, it really would not matter. He has indicated that he cannot pay. [redacted] First, from a fairness perspective, one can readily understand the imposition of late payment penalties of one per cent for the first day late, followed by four per cent six days later.[871] It is also readily understandable to see the imposition of a use of money interest charge being imposed.

But what about when the tax in dispute exceeds many years and the amount of money is beyond the realm of most individuals. Do Inland Revenue really believe there is a 'pot of gold' somewhere in Kawakawa Bay or in an overseas bank account? There may be a bank account somewhere but if there is one, I would have thought that Inland Revenue would have located it by now. It is common knowledge to Inland Revenue that Mr Russell's property in Kawakawa Bay is owned by a trust, as is two other houses occupied by his children as beneficiaries, including the Pakuranga property[872] (where his son had lived) that were once the offices of the Commercial Management business.

---

869 [redacted]

870 Part IX – Penalties, TAA 1994.

871 Section 139B (2) TAA 1994.

872 The 6 Downsview Road property was sold at auction in 2012.

4 The 'rule of law'

'The rule of law'[873] is at once one of the most persistent and mysterious phrases in jurisprudence.[874] All taxpayers should be treated impartially by Inland Revenue. Epstein provides an example:[875]

> Suppose, for example, we had one regime of taxation that applied to everyone whose surnames began with letters A-M and a different regime for those whose surnames began with letters N-Z. We might be able to argue about which regime was better, so there might be no clear answer to the question as to whether we should be taxed the A-M way or the N-Z way. But we would be confident that a single system that applied to everyone equally would be better than a regime that distinguished between groups in this way, no matter which rule was chosen.

Inland Revenue have procedures in place through legislation that aims to always treat taxpayers on equal footing. When penalties are imposed, there are procedures in place to ensure there is consistency in application whether the taxpayer is located in Auckland or Invercargill, or somewhere on the East Coast of the North Island. If taxpayers were treated differently due to their location, this would affect compliance, as fairness is one of the factors that has an impact on compliance. [redacted] This impartial treatment is vital in a tax system. [redacted][876] The Use of Money Interest is also applied to taxpayers in an impartial manner. One of the criticisms of the pre-1998 penal tax system was the arbitrariness of the application of penalties.[877]

The two sections of legislation Mr Russell considers he has most impacted are s 6 TAA 1994 and s 27 BORA. Section 6 TAA 1994[878] addresses the responsibility on Ministers and officials to protect

---

[873] "The rule of law is an amalgam of standards, expectations and aspirations: it encompasses traditional areas about liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed". TRS Allan, *Law, Liberty and Justice* (Clarendon Press, Oxford, 1993) at 21 as cited in Epstein, above n 720.

[874] Epstein, above n 720, at 4.

[875] At 4.

[876] [redacted]

[877] Essentially the rules are to compensate the Commissioner for the loss of use of money through taxpayers paying too little tax; compensate taxpayers for the loss of use of money through their paying too much tax; and to encourage taxpayers to pay the correct amount of tax on time. Vial states that 'it is therefore fair to assume that Parliament's intention in enacting UOMI rules was that the first objective of compensating the party that is "out of pocket" and the second objective of encouraging compliant taxpayer behaviour should be ranked equally in importance: Vial, above n 860, at 24.

[878] The section charges every Minister and every officer of any government agency, having responsibilities under the TAA 1994 or any other Act, in relation to the collection of taxes and other functions under the Inland Revenue Acts are, at all times, to use their best endeavours to protect the integrity of the tax system.

the integrity of the tax system in a broader sense. Section 6(2) TAA 1994 makes reference to what is included in the meaning of 'the integrity of the tax system'.[879] The 'integrity' of the tax system includes the responsibilities of those administering the law to do so fairly, impartially and according to the law, as well as taxpayer perceptions of the integrity of the tax system.

Mr Russell has fervently maintained that a vendetta has been conducted towards him by Inland Revenue staff. This could be his validly held perception concerning the 'integrity of the tax system,' only he really knows the answer to that. Perhaps 'integrity is in the eyes of the beholder.' The courts have addressed what could be considered an unmeritorious approach towards Mr Russell in some of the litigation he has been involved in, such as *Case U11*[880] and *Case U16*[881] with comment from Judge Willy that would suggest that Mr Russell's perception of integrity has been tainted. There have also been adverse comments in relation to officers of Inland Revenue in *Miller*[882] where Baragwanath J briefly mentioned the importance of the 'spirit and letter of the law being adhered to by the tax authority.'[883]

Although s 6 TAA 1994, without limiting its meaning, states that the integrity of the tax system includes (f) the responsibilities of those administering the law to do so fairly, impartially, and *according to the law*, it is presumed that the 'law' in this sentence is to be considered in the 'letter of the law' context. However, perhaps the section overall, which includes a taxpayer's perceptions of the integrity of the tax system, would give the word a broader meaning, also encapsulating the word in a 'spirit of the law' sense. This being the case, one can see how Inland Revenue on occasion have not treated Mr Russell within the 'spirit' of the law as one would expect. After years of turgid litigation history it would be understandable that some Inland Revenue staff have simply become 'battle weary'.

---

[879] Integrity of the tax system includes the rights of taxpayers to have their liability determined fairly, impartially and in accordance with the law; the rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; the responsibilities of taxpayers to comply with the law; and the responsibilities of those administering the law to maintain the confidentiality of the affairs of the taxpayer. These rights and responsibilities are what would be considered by any modern tax administration to be essential to a well-functioning tax system. For further reading see Duncan Bentley (ed.) *Taxpayers' Rights: An International Perspective* (Revenue Law Journal, School of Law, Bond University, Queensland, 1998) 4229. [Inland Revenue also have an Inland Revenue Charter in respect of how a taxpayer will be treated by Inland Revenue staff – see Inland Revenue website: *www.ird.govt.nz*. See also A.J. Sawyer, "A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries: Have New Zealand Taxpayers' Been "Short-changed"?" (1999) 32 *Vanderbilt Journal of Transnational Law* 1345.]

[880] *Case U11*, above n 293.

[881] *Case U16*, above n 709.

[882] *Miller v Commissioner of Inland Revenue*, above n 142.

[883] At 90.

It is difficult to see any judicial contribution to either the BORA 1990 or s 6 TAA 1994 in relation to the swathes of template litigation, but Mr Russell maintains his contribution is 'bringing attention to both of them in any case." He states that:[884]

> natural justice is not a procedural matter, it's an outcome matter….and if the outcome is perceived by the public to be unjust, then that person has not received natural justice.

Mr Grierson, counsel for Mr Russell submitted in *Case R25*[885] that Inland Revenue officers were out to 'get' Mr Russell, and had constantly harassed him and his clients by ways of constant auditing and refusing to pay out GST refunds. [redacted] Perhaps by way of conclusion to the vendetta argument it should be noted that in 1999[886] Judge Barber observed that while he had seen no suggestion of vendetta conduct on the part of Inland Revenue to date he had seen 'much unhelpful conduct' from some of Inland Revenue's officers. Further in 2000[887] the TRA observed that although the allegation of vendetta had been canvassed in *Miller v Commissioner of Inland Revenue,*[888] it had not been canvassed to the extent contemplated by Mr Russell for some years or by his Honour. Having said that his Honour then said:[889]

> However, I do not wish to raise false hopes in Mr Russell. I confirm the view I have stated on a number of occasions that I have found no evidence of vendetta or any type of abuse of process which would affect the integrity of template assessments; but I have often felt that there has been quite obstructive and uncooperative conduct towards Mr Russell and his clients by Officers of the IRD. That, of course, is a quite unacceptable way for the IRD to treat any citizen.

These comments were made prior to the *O'Neil*[890] decision and a lot has happened between Mr Russell and Inland Revenue since, as displayed in this thesis. Perhaps this is where it sits, no evidence of a vendetta but clearly inappropriate attitudes by some within a tax administration. Mr Russell freely states that defending the template has cost him over $5 million dollars,[891] and he believes it has cost the revenue in excess of $30 million.[892] This is an expensive sum by any

---

[884] Interview with Mr JG Russell, above n 23.

[885] *Case R25*, above n 48.

[886] *Case U24* (1999) 19 NZTC 9,223 (NZTRA) at [40].

[887] *Case U42* [2000] 19 NZTC 9,384 (NZTRA) at [9].

[888] *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,961 (HC).

[889] *Case U42*, above n 887, at [9].

[890] *O'Neil v Commissioner of Inland Revenue*, above n 2.

[891] Mr Russell 'conservatively estimates' that he has spent $5 million over the years on his court battles. Nick Krause, "Accountant is relaxed about huge tax claim", *The Dominion Post* (2nd ed., New Zealand, 11 August 2010) at 4.

[892] Mr Russell claims to have confirmed during a cross examination in the TRA that Inland Revenue has spent some $30 million pursuing him over the years. Inland Revenue declined to comment on Mr Russell. Krause, above n 891, at 4.

account and it is surprising that it has even reached anywhere near that figure. [redacted] An 'obstructive and uncooperative conduct' will only have added expense to both sides, as evidenced in *Case U11* and *Case U16*.

Although disputes (even under the current disputes resolution process) take a long time to proceed[893] through to completion it would be doubtful if a taxpayer would still be litigating 25 years later. Mr Russell has received a tremendous amount of information requests from Inland Revenue over many years. Although this has waned in more recent times I would doubt whether any person would now receive 101 information requests in one day. Standard Practice Statement SPS 05/08[894] outlines the Inland Revenue procedures when issuing s 17 notices. Generally 28 days are given to comply with the requirements of such a notice, with an extension of time given in genuine circumstances. If Inland Revenue were so concerned to get so much information perhaps the use of s 16 TAA 1994 may have been warranted rather than expect a taxpayer to comply with what essentially was in impossible task. This may have been a better option for both parties.

The tax disputes process implemented in 1996 was designed to improve the timely resolution of tax disputes. Lennard commenting on the Russell cases, states: "hard cases make bad law, so it is said, but even easy issues like the (in)effectiveness of the J G Russell tax avoidance template have the potential to make tardy law."[895] Lennard then states that indeed the Russell template cases "still persist, a quarter of a century or so after the events with which they are concerned." This is perhaps an indictment on both sides.

[893] See also Michael Lennard, "How long to resolution? Delay in Dispute Resolution Process", August 2008, *www.mikelennard.com/?t=32* (Accessed 4/1/2013).

[894] SPS 05/08: Section 17 Notices (July 2005).

[895] Michael Lennard, above n 893.

D "…its God's work to them, it really is." [896]

1 The 'Russell team'

[redacted]

[redacted][897] *Case U11*[898] and *Case U16*[899] both suggest that individual attitudes have come to the fore in relation to dealing with Mr Russell or his clients, [redacted] In *Miller v Commissioner of Inland Revenue*[900] Baragwanath J stated that 'the temptation (by Inland Revenue officers) to overreact against conduct seen as anti-social must be curbed.[901]

[redacted][902]

---

[896] [redacted]

[897] [redacted]

[898] *Case U11*, above n 293.

[899] *Case U16*, above n 709.

[900] *Miller v Commissioner of Inland Revenue*, above n 142.

[901] At 90.

[902] [redacted]

[redacted][903]

2 Impact on Inland Revenue policy and procedure

[redacted][904]

[redacted][905]

There can be a balance of power issue around investigations, and quite rightly so. Inland Revenue are after information to determine the correct tax position and this thesis has demonstrated at times the difficulty Inland Revenue has had in obtaining information in a timely manner. There are of course situations that can develop where Inland Revenue may be in litigation with a taxpayer and use their statutory information collection powers in addition to the usual court discovery procedures. Care must be taken and this was highlighted in the *Vinelight Nominees Ltd*[906], *Chesterfield Preschools Ltd*[907] and *Next Generation Investments (in liq)*[908] litigation and commented on by Keating.[909]

Inland Revenue have very deep pockets (or at least the taxpayer does) compared to an average litigant and it is surprising how much time and energy has been spent addressing Mr Russell's activities. [redacted]

[903] [redacted]

[904] [redacted]

[905] [redacted]

[906] *Vinelight Nominees Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19,298 (HC).

[907] *Chesterfield Preschools Ltd v Commissioner of Inland Revenue (No 2)* (2005) 22 NZTC 19,500 (HC).

[908] *Next Generation Investments Ltd (in liq) v Commissioner of Inland Revenue* (2006) 22 NZTC 19,775 (HC).

[909] M. Keating, "The Use of the Commissioner's Powers during Litigation" (2007) 13 NZJTLP 195 at 195.

Mr Russell has clearly been a challenge for Inland Revenue to deal with. He is not only exceptionally clever, but also aware of law changes as they occur. Mr Russell was aware of the then new BORA when the Millers and O'Neil's were first interviewed in 1990. He was very aware of the law of recusal when I interviewed him in 2010 just prior to the 'Track E' substantive litigation in the Auckland High Court.

Will there be another John George Russell on the New Zealand tax landscape? I doubt if there will be to a similar extent. It would be difficult to imagine anyone with not only his ability but more importantly his tenacity to see it through. It is not a light thing to be engaged with a powerful revenue authority, not just for an audit or two but for over three decades.

Will Inland Revenue have further difficulties with taxpayers long after Mr Russell has left the tax dispute landscape? The answer is an absolute "yes." History does repeat and although lessons have no doubt been well learned as a result of the Russell litigation there will always be cases where audits get out of hand. Mr Russell is not a normal taxpayer to engage with.

3 Settlement and the 'spirit' of the law

[910]

Earlier in this thesis mention was made in regard to the letter and spirit of the law. The penalties provisions and use of money interest rules are expressly 'letter' in nature and this thesis would not suggest that these should be modified or changed.[911] The issue of settlement, however, can be managed with the 'spirit' of the law in mind. There clearly is a tipping point where a taxpayer with a long standing contested tax dispute will essentially 'switch off' as the growing interest and

[910]

[911]

penalties becomes unmanageable and clearly non-payable. [redacted]

Mr Russell has expressed a desire to retire completely. He did offer to settle but the terms of his settlement were not acceptable to Inland Revenue. [redacted][912]

[redacted]

The tax quantum was about $60 million at the time. Mr Russell said "I will pay that…at a rate of $1,000 a week." [redacted][913] Mr Russell replied:[914]

> oh well, I can't do better than that…that's a true offer but I guarantee you I will pay you $1,000 a week until the day I die or the $60 million, whichever comes first,…you guys can pray nightly for my good health to keep me going, and you will get more money.

There was one condition in his offer, [redacted][915] [redacted] Mr Russell considered $52,000 per year a considerable sum and thought he would be good for another 10 years or so.

He has recently had further discussion with Inland Revenue regarding settlement. In fact he made another offer arguably more generous than the first. [redacted][916]

---

912 [redacted]

913 [redacted]

914 Interview with Mr JG Russell, above n 156.

915 [redacted]

916 [redacted]

[redacted]

Although in the first instance it may appear that Mr Russell would not seek bankruptcy this is actually the option he considers offers the best outcome for him and the worst for Inland Revenue. [redacted][917]

Mr Russell claims that he has been spending $1,000 per week anyway on template related matters, so he was sure he could keep to his offer if it was accepted. [redacted]

In *Case Y8*[918] Judge Barber made comment in relation to the prospect of collection. His Honour stated:[919]

> Also, the disputant maintains that his total available assets do not exceed about two million dollars. If so, the assessments of 80 million dollars or more, with massive penalties and interest to be added to that, *seem futile* from a collection point of view. (emphasis added)

Judge Barber, in referring to the quantum of tax avoided, continued:[920]

> …Even if the disputant is only assessed at one stream of income level within the template transactions, much more money than two million dollars must have been avoided by the template scheme and diverted to the disputant. Perhaps it is untraceable at this stage, and a substantial part of it must have been applied in litigation costs by the disputant over the past 20 years of so. *I feel there is an air of unreality in the continuance of this litigation*. (emphasis added).

Judge Barber further stated "I have endeavoured to steer the parties into a settlement (after about 20 years of their litigation), but without success."[921]

It is only the parties to any settlement discussion that know what may have been offered or declined, but it is clear through the above comments that Judge Barber would have preferred to

---

[917] [redacted]

[918] *Case Y8* (2007) 23 NZTC 13,076 (NZTRA).

[919] At [114].

[920] At [114].

[921] At [112].

have seen a settlement rather than have the 'turgid saga' continue. This comment in *Case Y8*[922] was made in June 2007, over five years ago. The litigation costs are such that in an attempt to contain further costs Mr Russell has appeared in person at the closing stages of this litigation. However, the latter cases are probably the most important to him as they will produce the 'death knell blow' to any success he may have thought he had.

[redacted]

Judge Barber in 2004 summed up his thoughts regarding settlement in relation to the template litigation.[923] Perhaps indicating the necessity of a pragmatic approach in what is really a unique situation, Judge Barber stated:[924]

> At this stage *any sensible person* would be focusing on some type of settlement along the lines that the income stream made the subject of the tax avoidance scheme be taxed at the tax rate for material times, but only taxed once (i.e. at one level) in terms of a reconstruction under s 99(3); and that for GST purposes only one level of income stream be looked at; and that to facilitate a settlement penalties be eradicated (*by special Act of Parliament if necessary*) on the basis of the core tax being paid within a reasonable period i.e. reasonable time should be given for payment and, probably, with interest for use of money. (emphasis added).

This type of approach would have alleviated any of the double taxation concerns that have been raised over the years. Even in the Court of Appeal in February 2012[925] Mr Russell raised concerns that certain income in respect of the template transactions had been taxed more than once.

In relation to settlement Judge Barber continued:[926]

> I think it is in the national interest that a settlement of all these Russell tax avoidance matters be achieved; otherwise matters may drag on in the Courts for another decade or more. It seems unlikely that there will be relief for Mr Russell and his clients, but it must be desirable that the State obtain the outstanding core tax as soon as possible under a settlement which leads to the achieving of actual payment of that debt.

[922] *Case Y8*, above n 918.

[923] *Case W37*, above n 325, at [53].

[924] At [53].

[925] *Russell v Commissioner of Inland Revenue*, above n 32.

[926] *Case W37*, above n 325, at [53].

It is fair to say that the approach by Inland Revenue to settlement of the Russell litigation has been less than pragmatic. Inland Revenue's approach to settlement has changed from the time of the early template decisions, especially as a result of cases. In *Auckland Gas Co Ltd v Commissioner of Inland Revenue,*[927] the Court of Appeal unanimously rejected the Commissioners' insistence on settling tax disputes only on a principled basis, and ruled that Inland Revenue was entitled to enter into compromise settlements. Richardson P stated that both the taxpayer and the Commissioner operating under the care and management responsibilities imposed under s 6 and 6A TAA were entitled to make *sensible* litigation, including settlement decisions.[928] (emphasis added)

[927] *Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 409 (CA); (1999) 19 NZTC 15,027 (CA).

[928] At 15,034.

Chapter XI
Concluding Reflections

XI Concluding Reflections

[redacted][929]

A Mr Russell's Reflections on Procedure

Mr Russell considers procedural issues are very important, there are reasons for procedures and stated 'if you get the procedure wrong you will get the answer wrong.'[930] [redacted][931] [redacted][932]

[redacted][933]

Mr Russell stated that if his contribution was only that: [934]

> you should challenge the thinking of judges on what they say, no matter what court it is, even the highest court of the land, if what they say doesn't look right, then look into it and analyse it yourself – if that is all the contribution I make then that would be a magnificent contribution.

[929] [redacted]

[930] Interview with Mr J G Russell, above n 1.

[931] [redacted]

[932] [redacted]

[933] [redacted]

[934] Interview with Mr J G Russell, above n 1.

This comment clearly ties in with the game player theory discussed earlier in this thesis where a game player thinks what they are doing is fulfilling their social obligations and they think they are being good citizens.

A further somewhat questionable contribution made is "look at the statute and forget judge made law" stating that the law is made by Parliament. He considers that judge made law can sometimes be contrary to statute law and is surprised that the judge made law prevails. This comment fits into his view of tax avoidance and fits with the conclusion that Mr Russell lives in a pre-*Challenge* world. This approach would essentially ignore the *Ben Nevis*[935] and various case law developments post *Challenge*.

B Any Regrets Mr Russell?

With litigation spanning over so many years, and with the cost of the litigation only being part of the story, there is also of course the expense in time and worry. One may think that Mr Russell may be immune from psychic compliance costs,[936] such as worry. It would be unfair to say that Mr Russell has been unaffected by the toll of the last 30 years.

Clearly one would have to be motivated to keep going with this type of litigation. Many people would have simply given up. Mr Russell described the on-going litigation as "a bit like being pregnant…you really have to see it through."[937]

In relation to any regrets in life that Mr Russell may have he replied, after taking a moment to reflect, "I don't think so…" and went on to say:[938]

> I would have rather not have had this row with the IRD, but I don't see how you can…the point is I firmly believe if it hadn't been over the Russell template it would have been over something else…because the Russell template only was what they majored on in the end, and if they hadn't done that…I mean…ever since then they are going on about other things now…you see the 'Track E' case is a perfect example…the 'Track E' case they taxed all…90 per cent of that income that they are now assessing to me…they have already taxed to other people…so why would they want to tax it to me?

From a personal time perspective Mr Russell said template related matters have taken up more than half of his time. This has been for a period of around 28 years. As far as a life outside of the 'tax

---

[935] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 47.

[936] John Hasseldine, "The Costs of Compliance" (September 1989) 68 The Accountants' Journal 60. Compliance costs can comprise monetary (outlay) costs; time costs and psychic costs. Psychic costs include the anxiety and stress caused by tax systems and whilst extremely difficult to measure are nonetheless very real for many taxpayers.

[937] Interview with Mr JG Russell, above n 23.

[938] Interview with Mr JG Russell, above n 23.

wars' Mr Russell still plays the organ in the local Presbyterian Church and, although in a 2005 interview,[939] he was busy learning Scottish jigs he has had to give up the Scottish country dancing:[940]

> because I am too old for it, I mean there are guys down there that can do it at 80, but I am quite unsteady on my feet now…I don't know why that is but I have to be careful and watch where I put my feet and that sort of thing…so old age is catching up with me in that respect… I still think the mind is okay although you get more forgetful as you get older.

Mr Russell's intention was to try to retire within 12 months of our first interview in 2010. He said at the time that to do so might be a bit of wishful thinking. With regard to his greatest achievement he states tongue in cheek; "I think staying alive with all this…survival is probably the greatest achievement…"[941]

When asked in 2010 when the litigation would end he replied that it was up to Inland Revenue. He did not think it will end within the next year or so. In fact, with regard to the Track 'E' litigation, he thought it will go on for a while yet. He stated "if I was successful in the appeal they will appeal it…if they are successful I will appeal it…"[942]

He considers the ultimate outcome with regard to himself and Inland Revenue as being either for Inland Revenue to bankrupt him or get him in jail for some real or imagined offence. He considers that "they must be contemplating the possibility of being a guest of her Majesty…"[943]

Mr Russell continues:[944]

> …so you have to be realistic about the prospects…but you know…I'm certainly determined to battle it out…because I believe that they have got no case…and if it is going to end up that I have a bill for $128 million [now exceeding $200 million] that they have got up to now…well, you know…I will have to start saving up obviously…

---

[939] Kelly Sinoski, 'Meet John George Russell', *The Independent*, (Auckland, 2 March 2005).

[940] Interview with Mr JG Russell, above n 23.

[941] Interview with Mr JG Russell, above n 1.

[942] One of the interview questions I had written was to discuss with Mr Russell the 'Track A to E arguments'. I asked Mr Russell during our 28 July 2011 interview if a 'Track F' was yet to come. He replied "yeah, there might be a 'Track F'…they will never give up…whereas they live forever…I don't…and the idea is to get rid of me…one way or another". Since my interview, in *Case 5/2012*, above n 623, a 'Track F' was referred to by Mr Russell.

[943] Interview with Mr JG Russell, above n 156.

[944] Interview with Mr JG Russell, above n 156.

Mr Russell, commenting about the prospect of Inland Revenue collecting some of the tax states that Inland Revenue thought that he was worth at least $80 million. He claims, however, that he is:[945]

> not worth anything really…in money terms…the house, the motor car for what it's worth…I don't even own them…I have never owned them…the trust has always owned them…and so the prospects of them getting any more money are…[pretty remote].

Although an offer based on future life expectancy cannot be the basis for a settlement, it should have at least started the dialogue in that direction. It seems almost pointless to pursue an amount of money that has been 'blown out' by the years of late payment penalties and use of money interest. Mr Russell states that the amount claimed by Inland Revenue "could be a billion dollars, it wouldn't matter."

This raises an interesting point. When a tax dispute reaches the stage that figures can grow in the realm of $138 million in July 2010 to in excess of $180 million in 2012, one has to wonder the effect of this in relation to taxpayer compliance. It is clear that Mr Russell does not have anywhere near this level of money or access to it. It raises the point that when cases 'go bad' there is a tipping point where a taxpayer has no option but perhaps to either give up or keep litigating moot aspects, sometimes for delay purposes.

Although not advocating stopping the clock in relation to this type of dispute, there clearly has to be a mechanism for sensible settlement in relation to these very messy tax disputes. It would be interesting to know the administrative costs associated with the Russell template litigation for say the last five years. Even though a settlement may not have been a satisfactory 'scalp' for Inland Revenue purposes, the taxpaying public may have been better served in this one occasion for pragmatism.

[redacted][946] A suitable comment for this thesis is from 2010 where Daniel Hunt writes:[947]

> It's unimaginable how much money and IRD resources have gone into trying to incarcerate Russell, let alone the fees paid to tax lawyers in Russell's defence. But seriously, is there really any benefit to be gained in continuing this battle and yet spending more and more taxpayer's money? *The IRD know they're not going to get any tax money from Russell now but just want to prove their point that you should not mess with the IRD*. In my view this was

[945] Interview with Mr JG Russell, above n 156.

[946] [redacted]

[947] Daniel Hunt, "J G Russell 30 years on – is the IRD ever going to give up?" (6 August 2010) Talktax *http://www.talktax.co.nz/index.php/2010/jg-russell-30-years-on/* (Accessed on 24/7/2011).

> proven in the structured finance cases. Enough is enough. Let the JG Russell legend come to an end……one has to wonder though, what on earth happened to all that money??? *If for many years Mr Russell's scheme has worked then I am sure, he has a scheme or a way the money would not be discovered any time soon…* (emphasis added)

However, Mr Russell states that Inland Revenue will not get anything from him. He considers that it was never really was about the money for Inland Revenue.

C Settling Disputes with 'Clubs and Spears'

At the close of our time together I asked Mr Russell "what would you do if you had your time over again?" [948] Mr Russell said that he never really had a plan going through life. He never had a plan to do anything in particular and has tended to "roll with the punches a bit."[949] He quite strongly said "the main thing is you should enjoy the work you are doing, whatever it is, and if you don't enjoy what you do then find something else."[950]

Mr Russell said that if he did have his time again he probably would have done a few things a bit different with the benefit of hindsight but went on to say that he was not unhappy with what had happened. Money has never been his aim in business, although he liked making money, perhaps more for the challenge. He stated that he liked to help people such as in the 'doom and disaster' type work stating: "you truly help people that are in big trouble, and they are very grateful."[951]

In the future, he does want to see the end of the litigation. [redacted] He did concede however that it is currently better than "settling disputes with clubs and spears."[952]

[948] Interview with Mr J G Russell, above n 1.

[949] Interview with Mr J G Russell, above n 1.

[950] Interview with Mr J G Russell, above n 1.

[951] Interview with Mr J G Russell, above n 1.

[952] Interview with Mr J G Russell, above n 1.

Chapter XII
Future Research

XII Future Research

A limitation with this thesis is the amount of material that has had to be left out of the submitted version of the LLM. Mr Russell has provided such a rich 'tapestry of tales' during our interviews and time together and it is clearly impossible to articulate all of the stories he presented into one document. I have had to be selective with the aspects that I have highlighted. Another researcher would have placed a different emphasis on aspects of the interviews and source documentation. With hindsight the story of the assessment 'Tracks' or the alleged vendetta could easily have been a complete thesis.

Mr Russell was a well-respected management accountant in the early part of his career in industries that were beginning to flourish in a post-war New Zealand. It would be interesting to capture some of Mr Russell's earlier business experience in the form of a narrative. Mr Russell was a leading figure in the establishment of the New Zealand money market and it would be a worthwhile aim to capture this story. I have aspects of Mr Russell's early career success recorded and would like to develop this material further. Mr Russell's stories of the New Zealand business environment in the 1960s were fascinating. He also has very interesting insights into today's economy and its problems.

This thesis has been unable to contain the more historical aspects of Mr Russell's life which is intended to be part of a future publication project, a book looking at the life of Mr Russell. Mr Russell has kindly agreed to write the forward to a prospective book. [redacted]

In **Appendix 13** of this thesis I have placed a table with a small number of selected cases related to Mr Russell's litigation. It is a very short table compared to the amount of litigation, purely intended to provide an idea of what a case table may look like. The table is quite useful to gauge the volume of litigation happening at a particular time, and often within a short timeframe. A future project could be to tabulate the entire Russell related litigation into a similar format and analyse the number

of procedural and substantive tax issues raised, in particular gaining an insight into how often similar arguments were raised.

I do wish to research compliance issues more, in particular the game player. [redacted]

Chapter XIII
Conclusion

XIII Conclusion

I think it is important to state that Mr Russell may have been quite different at the age of 42 when he left Securitibank, compared to aged 76 when I first met him in Kawakawa Bay in 2010. The fact that Mr Russell would have been different to have met several years ago, say in the mid-1990s or at the time of the *O'Neil* Privy Council decision, supports the notion that taxpayers can move along the left axis of the Compliance Model with respect to attitudes towards compliance.

[redacted][953] [redacted][954] He would have had no idea of what would be unleashed over the next 18 years!

What will be gained out of ultimately being the victor? Inland Revenue have proven that the tax template was a tax avoidance template, confirmed in the 2001 *O'Neil* Privy Council decision.[955] The on-going litigation may eventually prove that Inland Revenue were 'right'.

The requirement to conduct a four point analysis as stated in the 1990 CPS was raised in the initial litigation related to the template.[956] Mr Russell is still raising the same issue in 2012 stating that the CPS is "not a fetter on the Commissioner's power given to him by Parliament, but rather an instruction on how the power should be exercised."[957] He considers that a careful and thorough four point analysis if not performed, disempowers the Inland Revenue Officer from invoking s 99 ITA 1976.[958]

It is clear that Mr Russell's view of the world is very different to that of the Inland Revenue. It would appear that Mr Russell is an 'outlier' in a tax context. A comment made by Mr Russell struck me as being somewhat sad. He said:[959]

> I have spent most of my life for the last 25 years on this…well quite frankly, you would have to say when you look at it…it has been a complete waste of time really…well not a complete

[953] [redacted]

[954] [redacted]

[955] *O'Neil v Commissioner of Inland Revenue*, above n 2.

[956] *Case R25*, above n 48.

[957] *Russell v Commissioner of Inland Revenue*, above n 32, at [6].

[958] At [6].

[959] Interview with Mr JG Russell, above n 156.

> waste of time, but it's largely been a waste of time because there has been an enormous input of energy but a very light impact has occurred…

This thesis has attempted to serve two purposes. First, it has sought to provide the reader with an insight into the person of Mr Russell, by way of his background, motivation and thought. Secondly, it has sought to consider his impact on New Zealand tax jurisprudence. Any person attempting to utilise a similar tax saving device as the Russell template scheme would certainly be caught with taking an abusive tax position, or regarded as a tax evader,[960] with substantial penalty and sanction.

This thesis has demonstrated that although exceptionally clever and able to push to the limit the statute law, Mr Russell has perhaps fallen foul of the changing attitudes towards tax avoidance, that were clearly developing post *Challenge*. It is now almost unimaginable that in the 1970s tax losses could essentially be traded with approval from a revenue authority. The *Challenge* case was really the start of a paradigm shift[961] needed to address an emerging tax avoidance problem in New Zealand. Similar tax avoidance issues were also becoming apparent in overseas jurisdictions such as the United Kingdom and Australia around a similar time.

It is almost unfathomable to think the Inland Revenue have income tax periods still outstanding for any taxpayer dating back to the 1980s, yet that is precisely the position Mr Russell is in. The 'Track E' assessments date back to 1985. Mr Russell's contribution to tax jurisprudence probably lies at best with the various 'track' assessment routes. Even though a 'Track F' may yet emerge it would appear that the issue of whether it was permissible for Inland Revenue to assess different parties via the different 'track' routes is now settled law. The application of s 99(3) and 99(4) ITA 1976 appears to be where any contingent litigation may remain. Mr Russell remains adamant that the same income has been taxed in some cases twice, and in some cases three times over.

Mr Russell's story has not only challenged Inland Revenue but also the judiciary by alleging the possibility of bias.[962] It is not unrealistic to see how Mr Russell perceived that his own tax 'track',

---

[960] In *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2008] NZSC 116 [2009] 2 NZLR 359. Mr D.J. White QC, counsel for Inland Revenue stated (at 171 of the court transcript) that "one would suggest that if Mr Russell's template schemes were entered into now, the law on all of that too would be considered evasion".

[961] See C. Elliffe and J. Cameron, "The Test for Tax Avoidance in New Zealand: A Judicial Sea Change" (2010) 16 NZBLQ 440 for discussion regarding a 'sea change' in relation to tax avoidance analysis resulting in the 'pendulum' swinging in favour of Inland Revenue. This is certainly apparent in the recent major New Zealand tax avoidance cases. The authors suggest that although the scheme and purpose approach remains; it is modified by two factors. The result of these changes is an empowering of the judiciary to pursue a form of interpretation which is much less formalistic and necessarily involves even more of an enquiry into the commercial and business motivations of the taxpayer. There were significant developments in New Zealand tax avoidance jurisprudence with the Supreme Court judgment in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 47.

[962] A High Court judge has recently decided his impartiality in a company dispute remains pure despite reading that one party had called him "a clown judge" in a taped conversation with a private eye. Judge Osborne said the "colourful" comment would not affect his pursuit of fairness for both parties, and, in any respect, it was his duty as a judge to set aside prejudices he held and be objective. Michael Berry, "Judge 'unbiased' despite clown comment", *The Press*, (online ed., Christchurch, 26 November 2012).

'Track E', could have been "predicted now"[963] before the case had been heard by Judge Barber. Even though the number of cases decided against Mr Russell by Judge Barber was substantial, it is clear that case law dictates the number of decisions decided towards a particular litigant in no way is an indicator of bias, rather the strength of the actual case. [redacted]

[redacted] Tax law can be exceptionally complex and the on-going *FB Duvall* litigation is a case in point. A specialist tax judge must obviously be suitably qualified, but it is worth noting that other tax jurisdictions, such as the United Kingdom where a much wider selection of judges is present, would not face the same initial concern of circumspectness. It may be a justification to say that the point is moot in Mr Russell's situation, as most TRA decisions were upheld on appeal.

It would be a shame for history to consider Mr Russell merely as 'The Master Tax Avoider'.[964] There is no doubt that Mr Russell was a competent accountant and had clearly contributed to the success of various entities prior to the commencement of the template litigation. This was clearly recognised by the various roles he had held and the esteem from his employers. Establishing and maintaining a tax consultancy practice with a large number of employees, despite being distracted daily with the compliance requirements of Inland Revenue, is indicative of his personal stamina that still remains intact today.

One could perhaps surmise that if Mr Russell had entered the world of merchant banking again after the Securitibank fallout had quelled, he may have achieved a notable level of success once more. [redacted]

Mr Russell is certainly 'old school', explained best by the example that he has only had an email address since late 2010! Although old school Mr Russell is a very progressive thinker, with a depth of business experience that surprised me.

---

[963] *Russell v Taxation Review Authority*, above n 585, at [40].

[964] Mr Grierson, acting for the taxpayers in *Case R25*, above n 48 described Mr Russell as "The Great Tax Mitigator" and "The Old Master of Tax." Mr Ruffin, counsel for Inland Revenue suggested that "The Master Tax Avoider" was more apt.

[redacted] It would be unlikely that there would be another taxpayer who could 'whip up a firestorm' and cause grief to Inland Revenue for over three decades. Over the last 30 years attitudes towards tax avoidance and tax evasion have shifted. Inland Revenue have varying penalties, including very punitive penalties for both criminal and civil evasion[965] in their 'toolbox' to discourage noncompliance.

History has a way of repeating itself and if anything this thesis may allude to is that great care must be taken from an administrative perspective for any revenue authority. In *Paul Finance*[966] it was clear that Inland Revenue were following correct protocol to verify a GST refund claim prior to releasing the refund cheque. It is unfortunate that the 'cheque had left the building', or at least could not have been stopped before leaving the confines of the mailroom. It is difficult to see what further action could have been taken by Inland Revenue.

That said, there are some very unusual aspects to the stance taken by Inland Revenue in relation to Russell matters. It is really unacceptable to think that a revenue authority would send out so many s 17 TAA 1994 notices to a taxpayer and expect them to comply. The current s 17 Standard Practice Statement provides for at least 28 days to provide information and extensions of time are granted in genuine circumstances, but I would doubt whether any taxpayer would be in receipt of so many s 17 notices in one day any time soon. Perhaps this aspect has been relegated to history. It is simply unacceptable tax administration. There were other powers that Inland Revenue had at their disposal, both s 16 and s 19 TAA 1994, and one may wonder why these powers were not used to 'speed up' resolution.

Mr Russell had luck on his side when challenging the delegation of Mrs Latimer, getting off on a technicality. Mr Russell has said that he has had more success in the court as a result of good luck than anything else. [redacted]

[redacted]

[965] For further reading on when a deliberate arrangement to avoid income tax strays into the criminal jurisdiction see C. Elliffe, 'Tax Fraud: When is Tax Avoidance a Criminal Offence?' in Andrew Maples and Adrian Sawyer (eds) *Taxation Issues: Existing and Emerging*, (The Centre for Commercial and Corporate Law, Christchurch, 2011) at 79 - 100.

[966] *Paul Finance Ltd v Commissioner of Inland Revenue*, above n 668, at 3.

[redacted]

The *FB Duvall* litigation,[967] the 'tortuous saga' as it has been aptly referred to as, was certainly by far the most difficult to explain in this thesis. [redacted]

With regard to Mr Russell's template clients it was suggested by Judge Barber in *Case R25*[968] that perhaps clients of Mr Russell's may have wanted to sue him. [redacted] It is clear that Mr Russell's clients placed tremendous trust in his ability and opinion in relation to their own tax matters.

It has to be remembered that Mr Russell asked for a judicial settlement conference several years ago. If settlement had occurred Inland Revenue would have received $260,000 by now (if the terms had been adhered to) and saved in litigation costs since. Perhaps the last line for this thesis could have been from Mr Russell himself when he said "Commercial Management is a twilight industry…but the sun has not yet fully set!"[969]

[967] *FB Duvall Ltd v Commissioner of Inland Revenue* (1997), above n 524; *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 507; *FB Duvall Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,039 (HC); *FB Duvall Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,362 (HC); *FB Duvall Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,515 (HC); *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 526; *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 532; *Commissioner of Inland Revenue v FB Duvall Ltd* HC Auckland CIV 2007-404-2708 29 February 2008; *Commissioner of Inland Revenue v FB Duvall Ltd* HC Auckland CIV 2007-404-2708, 13 November 2008; *Commissioner of Inland Revenue v FB Duvall Ltd* HC Auckland CIV 2004-404-4460, 8 March 2005; *Commissioner of Inland Revenue v FB Duvall Ltd* (2005) above n 531; *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 523; *FB Duvall Ltd v Commissioner of Inland Revenue*, above n 52.

[968] *Case R25*, above n 48.

[969] Interview with Mr JG Russell, above n 1.

A Retirement at last! … Not Quite!

I did ask Mr Russell if there was a big pot of money somewhere. It is the question that perhaps people wish to know the answer to. He told me that he once said to Inland Revenue that if there was a big pot of money somewhere they should have found it by now as they have had so many people working on his cases for many years. He also said to Inland Revenue that if they did find a big 'pot of money' they could keep half it, because it wouldn't be his. There are no Swiss bank accounts. [redacted][970] Mr Russell thinks that Inland Revenue never thought there was a lot of money. It has simply taken on a life of its own.

Once he retires Mr Russell has about 3,000 books stored ready to read. John Grisham novels are among his favourite. In 2001 he mentioned in an interview, that the reason he likes the John Grisham novels is because they denigrate lawyers. He would like to take a few formal professional lessons to play the organ because he is self-taught. He stated that both he and Melva would have no trouble filling in time; they would attend more plays and cultural events. In relation to the years of litigation he said "The litigation side is interesting – it keeps your mind going – you need something to keep your mind agile as you get older."[971] The litigation certainly has does that for him. Mr Russell in closing comments stated that "Inland Revenue have never been able to get a handle on me not being motivated by money."[972]

I asked Mr Russell what his main legal contribution was. He replied with a grin that his main contribution to the legal profession was in fact 'monetary'.

I was in a focus group with several tax barristers, lawyers and accountants a few weeks ago. The name of Mr Russell came up to which there was an almost audible shrug. [redacted]

Although the cost and expense to all parties of the template litigation was been immense, there is one thing for sure; Mr Russell has been a persistent and colourful character in the New Zealand tax landscape and I am sure that the courts and Inland Revenue have not seen the last of him….just yet!

---

[970] [redacted]

[971] Interview with Mr J G Russell, above n 1.

[972] Interview with Mr J G Russell, above n 1.

Bibliography

XIV Bibliography

(Alphabetical listing)

Cases

New Zealand

Auckland Casino Ltd v Casino Control Authority [1995] 1 NZLR 142 (CA).

Accent Management Ltd v Commissioner of Inland Revenue (2005) 22 NZTC 19,027 (HC).

Accent Management Ltd v Commissioner of Inland Revenue (2006) 22 NZTC 19,758 (HC).

Accent Management Ltd v Commissioner of Inland Revenue [2007] NZCA 230, (2007) 23 NZTC 21,323.

Accent Management Ltd v Commissioner of Inland Revenue [2007] NZCA 231, (2007) 23 NZTC 21,366.

Accent Management Ltd v Commissioner of Inland Revenue (2010) 24 NZTC 24,126 (HC).

Aqua Avia Society v CIR (1983) BCR 540.

Auckland Gas Co Ltd v Commissioner of Inland Revenue [1999] 2 NZLR 409 (CA); (1999) 19 NZTC 15,027 (CA).

B v Auckland District Law Society (2003) 21 NZTC 18,221 (PC).

Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue [2008] NZSC 115; [2009] 2 NZLR 289; (2009) 24 NZTC 23,188 (SC).

Boyton v Commissioner of Inland Revenue (2002) 20 NZTC 17,615 (HC).

Brannigan v Davison [1996] 2 NZLR 278; [1996] 2 NZLR 338; [1996] NZAR 145 (CA).

Brierley Investments Ltd v Bouzaid [1993] NZLR 655 (CA).

BNZ Finance v Holland (1997) 18 NZTC 13,156 (CA).

BNZ Investments Ltd v Commissioner of Inland Revenue (2000) 19 NZTC 15,732 (HC).

BNZ Investments Ltd v Commissioner of Inland Revenue (2009) 24 NZTC 23,582 (HC).

Buckley & Young v Commissioner of Inland Revenue [1978] 2 NZLR 485 (CA); (1978) 3 NZTC 61,271 (CA).

Challenge Corporation Ltd v Commissioner of Inland Revenue [1986] 2 NZLR 513 (HC); (1984) 6 NZTC 61,807; (1984) 8 TRNZ 1.

Ch'elle Properties (NZ) Ltd v Commissioner of Inland Revenue [2004] 3 NZLR 274 (HC).

Ch'elle Properties (NZ) Ltd v Commissioner of Inland Revenue (2005) 22 NZTC 19,622 (HC).

Ch'elle Properties (NZ) Ltd v Commissioner of Inland Revenue [2007] NZCA 256, [2008] 2 NZLR 342.

Chesterfield Preschools Ltd v Commissioner of Inland Revenue (No 2) (2005) 22 NZTC 19,500 (HC).

Chesterfield Preschools Ltd v Commissioner of Inland Revenue (2007) 23 NZTC 21,125 (HC).

Chesterfield Preschools Ltd v Commissioner of Inland Revenue (2009) 24 NZTC 23,148 (HC).

Commercial Management Ltd v Registrar of Companies [1987] 1 NZLR 744 (CA); (1987) 3 NZCLC 100,221.

Commissioner of Inland Revenue v Panmure Consultants Ltd (2008) 23 NZTC 21,665 (HC).

Commissioner of Inland Revenue v BNZ Investments Ltd [2002] 1 NZLR 450 (CA); (2001) 20 NZTC 17,103.

Commissioner of Inland Revenue v Canterbury Frozen Meat Co. Ltd [1994] 2 NZLR 681 (CA).

Commissioner of Inland Revenue v Challenge Corporation Ltd [1986] 2 NZLR 513 (CA); (1986) 8 NZTC 5,001.

Commissioner of Inland Revenue v Challenge Corporation Ltd [1987] AC 155 (PC); [1986] 2 NZLR 513 (PC); (1986) 8 NZTC 5,219 (PC).

Commissioner of Inland Revenue v Dandelion Investments Ltd [2000] 2 NZLR 548 (CA).

Commissioner of Inland Revenue v Dandelion Investments Ltd (2001) 20 NZTC 17,293 (HC).

Commissioner of Inland Revenue v FB Duvall Ltd HC Auckland CIV 2007-404-2708 29 February 2008.

Commissioner of Inland Revenue v FB Duvall Ltd HC Auckland CIV 2007-404-2708, 13 November 2008.

Commissioner of Inland Revenue v FB Duvall Ltd HC Auckland CIV 2004-404-4460, 8 March 2005.

Commissioner of Inland Revenue v FB Duvall Ltd (2005) 22 NZTC 19,142 (HC).

Commissioner of Inland Revenue v Lemmington Holdings Ltd [1982] 1 NZLR 517 (CA).

Commissioner of Inland Revenue v NZ Wool Board (1999) 19 NZTC 15,476 (CA).

Commissioner of Inland Revenue v Penny & Hooper [2010] NZCA 231, (2010) 24 NZTC 24,287.

Commissioner of Inland Revenue v Ron West Motors (Otahuhu) Ltd (1989) 11 NZTC 6,189 (HC).

Commissioner of Inland Revenue v Ron West Motors (Otahuhu) Ltd (2003) 21 NZTC 18,281 (HC).

Commissioner of Inland Revenue v Ron West Motors (Otahuhu) Ltd (2006) 22 NZTC 19,748 (HC).

Commissioner of Inland Revenue v Ron West Motors (Otahuhu) Ltd (2006) 22 NZTC 19,927 (HC).

Commissioner of Inland Revenue v Ron West Motors (Otahuhu) Ltd (2008) 23 NZTC 21,835 (HC).

Commissioner of Inland Revenue v Rupe (2003) 21 NZTC 18,129 (DC).

Commissioner of Inland Revenue v Russell (2005) 22 NZTC 19,664 (DC).

Commissioner of Inland Revenue v Slioc Enterprises Ltd (2011) 25 NZTC 20,046 (HC).

Commissioner of Inland Revenue v Slioc Enterprises Ltd (2011) 25 NZTC 20,078 (HC).

Commissioner of Inland Revenue v Slioc Enterprises Ltd (2011) 25 NZTC 25,688 (HC).

Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd [2001] 1 NZLR 147 (CA); (2000) 19 NZTC 15,874 (CA).

Commissioner of Inland Revenue v VH Farnsworth [1984] 1 NZLR 428 (CA).

Commissioner of Inland Revenue v Wilson (1996) 17 NZTC 12,512 (CA).

Controller and Auditor-General v Davison [1996] 2 NZLR 295; [1996] NZAR 145.

Dandelion Investments Ltd v Commissioner of Inland Revenue [1997] 2 NZLR 96 (HC); (1996) 17 NZTC 12,689.

Dandelion Investments Ltd v Commissioner of Inland Revenue [2003] 1 NZLR 600 (CA); (2003) 21 NZTC 18,010.

Davies v Commissioner of Inland Revenue (2004) 21 NZTC 18,675 (HC).

Dinsdale v Commissioner of Inland Revenue (1998) 18 NZTC 13,583 (CA).

Douglas v Commissioner of Inland Revenue [2006] 1 NZLR 513 (HC).

Douglas v Commissioner of Inland Revenue (2009) 24 NZTC 23,331 (HC).

Douglas v Commissioner of Inland Revenue (2011) 25 NZTC 25,526 (HC).

Douglas v Commissioner of Inland Revenue [2012] NZCA 486.

*Downsview Nominees Ltd v Registrar of Companies (*2006) 22 NZTC 19,971 (HC).

Downsview Nominees Ltd v First City Corporation Ltd [1990] 3 NZLR 265 (CA); (1990) 5 NZCLC 66,303 (CA).

Downsview Nominees Ltd v First City Corporation Ltd [1993] 1 NZLR 51; (1993) 11 ACLC 3,101 (PC).

Erris Promotions Ltd v Commissioner of Inland Revenue (2003) 21 NZTC 18,330 (HC).

FB Duvall Ltd v Commissioner of Inland Revenue (1997) 18 NZTC 13,470 (HC).

FB Duvall Ltd v Commissioner of Inland Revenue M206/96 (No. 2) (1998) 18 NZTC 13,943 (HC).

FB Duvall Ltd v Commissioner of Inland Revenue (1999) 19 NZTC 15,039 (HC).

FB Duvall Ltd v Commissioner of Inland Revenue (1999) 19 NZTC 15,362 (HC).

FB Duvall Ltd v Commissioner of Inland Revenue (1999) 19 NZTC 15,515 (HC).

FB Duvall Ltd v Commissioner of Inland Revenue (2000) 19 NZTC 15,658 (CA).

FB Duvall Ltd v Commissioner of Inland Revenue (2006) 22 NZTC 19,866 (CA).

FB Duvall Ltd v Commissioner of Inland Revenue (2010) 24 NZTC 24,053 (HC).

FB Duvall Ltd v Commissioner of Inland Revenue (2011) 25 NZTC 20,101 (HC).

First City Corporation Ltd v Downsview Nominees Ltd & Ors (No. 2) (1989) 4 NZCLC 65,192 (HC).

Glaister v Amalgamated Dairies Ltd [2004] 2 NZLR 606, (2004) 16 PRNZ 1047 (CA).

Glenharrow Holdings Ltd v Commissioner of Inland Revenue (2005) 22 NZTC 19,319 (HC).

Glenharrow Holdings Ltd v Commissioner of Inland Revenue [2007] NZCA 346, [2008] 1 NZLR 222.

Glenharrow Holdings Ltd v Commissioner of Inland Revenue [2008] NZSC 116; [2009] 2 NZLR 359; (2009) 24 NZTC 23,236.

Golden Bay Cement Co Ltd v Commissioner of Inland Revenue [1996] 2 NZLR 665 (CA); (1996) 17 NZTC 12,580 (CA).

Hadlee v Commissioner of Inland Revenue [1989] 2 NZLR 447 (HC).

Hadlee v Commissioner of Inland Revenue [1991] 3 NZLR 517 (CA).

Hadlee v Commissioner of Inland Revenue [1993] 2 NZLR 385 (PC).

Henson Partnership v Commissioner of Inland Revenue [2009] NZCA 423, (2009) 24 NZTC 23,802.

Kemp v Commissioner of Inland Revenue (1999) 19 NZTC 15,110 (HC).

KJ Cummings Ltd v Commissioner of Inland Revenue (1998) 18 NZTC 13,537 (HC).

Knight v Barnett [1991] 2 NZLR 30; (1991) 13 NZTC 8,014 (CA).

Knight v Lamond (1989) 11 NZTC 6,273 (HC).

Knight v Lamond (1990) 12 NZTC 7,203 (HC).

Krukziener v Commissioner of Inland Revenue (2010) 24 NZTC 24,041 (HC).

Krukziener v Commissioner of Inland Revenue (2010) 24 NZTC 24,563 (HC).

Lawton v Commissioner of Inland Revenue [2003] 2 NZLR 48 (CA).

Lee v Lee's Air Farming Ltd [1961] NZLR 325 (PC).

Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue [1992] 2 NZLR 1 (PC).

Malcolm Hunt Ltd (Struck off) v Commissioner of Inland Revenue (HC) Auckland CIV 2006-404-178, 13 July 2006.

Managed Hotels Ltd v Commissioner of Inland Revenue (2011) 25 NZTC 25,777 (HC).

Managed Hotels Ltd v Commissioner of Inland Revenue (2011) 25 NZTC 20,090 (HC).

Mangin v Commissioner of Inland Revenue [1971] NZLR 591 (PC).

Miller v Commissioner of Inland Revenue HC Auckland M103/93, 15 July 1997.

Miller v Commissioner of Inland Revenue (1993) 15 NZTC 10,187 (HC).

Miller v Commissioner of Inland Revenue [1995] 3 NZLR 664 (CA).

Miller v Commissioner of Inland Revenue (1997) 18 NZTC 13,127 (HC).

Miller v Commissioner of Inland Revenue (1997) 18 NZTC 13,001 (HC).

Miller v Commissioner of Inland Revenue (1997) 18 NZTC 13,219 (HC).

Miller v Commissioner of Inland Revenue (1997) 18 NZTC 13,127 (HC).

Miller v Commissioner of Inland Revenue (Alt cit: Managed Fashions Ltd v Commissioner of Inland Revenue) [1999] 1 NZLR 275 (CA); (1998) 18 NZTC 13,961 (CA).

Miller v Commissioner of Inland Revenue (1999) 19 NZTC 15,300 (HC).

Miller v Commissioner of Inland Revenue (2002) 20 NZTC 17,826 (CA).

Miller v Commissioner of Inland Revenue (2003) 21 NZTC 18,243 (HC).

Mills v Dowdall [1983] NZLR 154 (CA).

Mirelle v A-G and Ministry of Commerce (1993) 7 PRNZ 107.

M & J Wetherill Company Ltd v Taxation Review Authority (2002) 20 NZTC 17,681 (CA).

Moonen v Film & Literature Board of Reviews [2000] 2 NZLR 9 (CA).

Muir v Commissioner of Inland Revenue [2007] NZCA 334, [2007] 3 NZLR 495 (CA).

O'Malley v Southern Lakes Helicopters Ltd HC Christchurch CP513/89, 4 December 1990.

O'Neil v Commissioner of Inland Revenue (Alt cit: Miller v Commissioner of Inland Revenue) [2001] UKPC 17; [2001] 3 NZLR 316 (PC); (2001) 20 NZTC 17,051.

Paul Finance Ltd v Commissioner of Inland Revenue (1994) 16 NZTC 11,257 (HC).

Paul Finance Ltd v Commissioner of Inland Revenue [1995] 3 NZLR 521 (CA); (1995) 17 NZTC 12,379 (CA).

Paul Finance Ltd v Commissioner of Inland Revenue (HC) CP65-SD00 17 August 2000.

Paul Finance Ltd v Commissioner of Inland Revenue (2000) 19 NZTC 15,655 (HC).

Paul Finance Ltd v Commissioner of Inland Revenue (2000) 19 NZTC 15,863 (HC).

Paul Finance Ltd v Inland Revenue Department HC Auckland CP151/94, 2 December 1999.

Paul Finance Ltd v Inland Revenue Department (2000) 19 NZTC 15,600 (HC).

Penny v Commissioner of Inland Revenue [2009] 3 NZLR 523 (HC).

Penny v Commissioner of Inland Revenue [2011] NZSC 95, [2012] 1 NZLR 433.

Peterson v Commissioner of Inland Revenue [2005] UKPC 5, [2006] 3 NZLR 433 (PC), (2005) 22 NZTC 19,098 (PC).

R v Bain [1996] 1 NZLR 129 (CA).

R v Baker [1989] 1 NZLR 738 (CA).

Reckitt and Coleman (New Zealand) Ltd v Taxation Board of Review [1966] NZLR 1032 (CA).

Re Securitibank Ltd (No.2) [1978] 2 NZLR 136 (CA).

Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue (2009) 24 NZTC 23,991 (HC).

Registrar of Companies v Commercial Management Ltd (1985) 2 NZCLC 99,298 (HC).

Roma Properties Ltd v Commissioner of Inland Revenue [2003] 1 NZLR 9, (2002) 20 NZTC 17,877 (CA).

Ron West Motors (Otahuhu) Ltd v Commissioner of Inland Revenue (2006) 22 NZTC 19,748 (HC).

Ron West Motors (Otahuhu) Ltd v Commissioner of Inland Revenue [2007] NZCA 248, (2007) 23 NZTC 21,434 (CA).

Ron West Motors (Otahuhu) Ltd v Commissioner of Inland Revenue [2007] NZCA 338.

Rotorua Regional Airport Ltd v Commissioner of Inland Revenue (2010) 24 NZTC 23,979 (HC).

Rupe v Commissioner of Inland Revenue (2004) 21 NZTC 18,519 (HC).

Rupe v Commissioner of Inland Revenue (2004) 21 NZTC 18,604 (HC).

Russell v Commissioner of Inland Revenue (1984) 6 NZTC 61,753 (HC).

Russell v Commissioner of Inland Revenue (2003) 21 NZTC 18,272 (HC).

Russell v Commissioner of Inland Revenue & Anor (2006) 22 NZTC 19,807 (CA).

Russell v Commissioner of Inland Revenue (2010) 24 NZTC 24,181 (HC).

Russell v Commissioner of Inland Revenue (2010) 24 NZTC 24,463 (HC).

Russell v Commissioner of Inland Revenue [2012] NZCA 128, (2012) 25 NZTC 20,120 (CA).

Russell v Commissioner of Inland Revenue [2012] NZSC 73, (2012) 25 NZTC 20,140.

Russell v District Court at Manukau (2002) 20 NZTC 17,704 (HC).

Russell v District Court at Manukau (2004) 21 NZTC 18,814 (CA).

Russell v Latimer (1990) 12 NZTC 7,321 (HC).

Russell v Taxation Review Authority (2000) 19 NZTC 15,924 (HC).

Russell v Taxation Review Authority (2001) 20 NZTC 17,418 (CA).

Russell v Taxation Review Authority (2002) 20 NZTC 17,602 (CA).

Russell v Taxation Review Authority (2002) 20 NZTC 17,832 (HC).

Russell v Taxation Review Authority (2003) 21 NZTC 18,255 (CA).

Russell v Taxation Review Authority (2003) 21 NZTC 18,309 (CA).

Russell v Taxation Review Authority (2003) 21 NZTC 18,272 (CA).

Russell v Taxation Review Authority (2009) 24 NZTC 23,284 (HC).

Russell v Taxation Review Authority [2011] NZCA 158, (2011) 25 NZTC 20,044 (CA).

Russell v Taxation Review Authority [2011] NZSC 96, (2011) 25 NZTC 20,077.

Saxmere Company Ltd v Wool Board Disestablishment Company Ltd [2009] NZSC 72, [2010] 1 NZLR 35.

Sea Hunter Fishing Ltd v Commissioner of Inland Revenue (2001) 20 NZTC 17,206 (HC).

Sea Hunter Fishing Ltd v Commissioner of Inland Revenue (No. 2) (2001) 20 NZTC 17,216 (HC).

Spencer v Commissioner of Inland Revenue (2004) 21 NZTC 18,818 (HC).

Spratt v Commissioner of Inland Revenue [1964] NZLR 272 (HC).

Timaru Herald Company Ltd v Commissioner of Taxes [1938] NZLR 978 (CA).

Vinelight Nominees Ltd v Commissioner of Inland Revenue (2005) 22 NZTC 19,298 (HC).

Westpac Banking Corporation v Commissioner of Inland Revenue [2009] NZCA 24, [2009] 2 NZLR 99.

Wetherill Company Ltd v Taxation Review Authority (2001) 20 NZTC 17,166 (HC).

Wetherill Company Ltd v Taxation Review Authority (2004) 21 NZTC 18,924 (CA).

White v Commissioner of Inland Revenue (2010) 24 NZTC 24,600 (HC).

Wire Supplies Ltd v Commissioner of Inland Revenue [2007] NZCA 244; [2007] 3 NZLR 458; (2007) 23 NZTC 21,404.

Wire Supplies Ltd v Commissioner of Inland Revenue [2006] 2 NZLR 384; (2005) 22 NZTC 19,357 (HC).

Wire Supplies Ltd v Taxation Review Authority (2005) 22 NZTC 19,395 (HC).

[redacted]

New Zealand Taxation Review Authority Cases

Case 4/2012, XXX v Commissioner of Inland Revenue (2012) 25 NZTC 1,016 (NZTRA).

Case 5/2012 [2012] NZTRA 05, (2012) 25 NZTC 1,017 (NZTRA).

Case E31 (1981) 5 NZTC 59,204 (NZTRA).

Case K28 (1988) 10 NZTC 257 (NZTRA).

Case L85 (1989) 11 NZTC 1,485 (NZTRA).

Case M104 (1990) 12 NZTC 2,660 (NZTRA).

Case M109 (1990) 12 NZTC 2,690 (NZTRA).

Case Q34 (1993) 15 NZTC 5,159 (NZTRA).

Case R25 (1994) 16 NZTC 6,120 (NZTRA).

Case T32 (1997) 18 NZTC 8,221 (NZTRA).

Case T34 (1997) 18 NZTC 8,232 (NZTRA).

Case T52 (1998) 18 NZTC 8,378 (NZTRA).

Case U11 (1999) 19 NZTC 9,100 (NZTRA).

Case U14 (1999) 19 NZTC 9,160 (NZTRA).

Case U16 (1999) 19 NZTC 9,168 (NZTRA).

Case U23 (1999) 19 NZTC 9,208 (NZTRA).

Case U24 (1999) 19 NZTC 9,223 (NZTRA).

Case U35 (2000) 19 NZTC 9,330 (NZTRA).

Case U41 (2000) 19 NZTC 9,380 (NZTRA).

Case U42 (2000) 19 NZTC 9,384 (NZTRA).

Case U45 (2000) 19 NZTC 9,397 (NZTRA).

Case V18 (2002) 20 NZTC 10,207 (NZTRA).

Case V22 (2002) 20 NZTC 10,262 (NZTRA).

Case W8 (2003) 21 NZTC 11,063 (NZTRA).

Case W22 (2003) 21 NZTC 11,212 (NZTRA).

Case W24 (2003) 21 NZTC 11,246 (NZTRA).

Case W25 (2003) 21 NZTC 11,251 (NZTRA).

Case W34 (2004) 21 NZTC 11,334 (NZTRA).

Case W35 (2004) 21 NZTC 11,340 (NZTRA).

Case W36 (2004) 21 NZTC 11,353 (NZTRA).

Case W37 (2004) 21 NZTC 11,360 (NZTRA).

Case W38 (2004) 21 NZTC 11,372 (NZTRA).

Case W39 (2004) 21 NZTC 11,375 (NZTRA).

Case W41 (2004) 21 NZTC 11,380 (NZTRA).

Case W49 (2004) 21 NZTC 11,454 (NZTRA).

Case X3 (2005) 22 NZTC 12,063 (NZTRA).

Case X4 (2005) 22 NZTC 12,069 (NZTRA).

Case X15 (2005) 22 NZTC 12,211 (NZTRA).

Case X22 (2006) 22 NZTC 12,278 (NZTRA).

Case X24 (2006) 22 NZTC 12,298 (NZTRA).

Case Y3 (2007) 23 NZTC 13,028 (NZTRA).

Case Y8 (2007) 23 NZTC 13,076 (NZTRA).

Case Y12 (2007) 23 NZTC 13,116 (NZTRA).

Case Y13 (2007) 23 NZTC 13,129 (NZTRA).

Case Y15 (2008) 23 NZTC 13,149 (NZTRA).

Case Y20 (2008) 23 NZTC 13,207 (NZTRA).

Case Y24 (2008) 23 NZTC 13,261 (NZTRA).

Case Z3 (2009) 24 NZTC 14,027 (NZTRA).

Case Z7 (2009) 24 NZTC 14,088 (NZTRA).

Case Z8 (2009) 24 NZTC 14,095 (NZTRA).

Case Z17 (2009) 24 NZTC 14,189 (NZTRA).

Case Z19 (2009) 24 NZTC 14,217 (NZTRA).

Case Z25 (2010) 24 NZTC 14,371 (NZTRA).

Australia

Curran v Federal Commissioner of Taxation (1974) 131 C.L.R. 409 (HCA).

Federal Commissioner of Taxation v Peabody (1994) 181 CLR 359 (HCA).

John v Federal Commissioner of Taxation (1989) 166 CLR 417 (HCA).

Newton v Federal Commissioner of Taxation [1958] AC 450 (PC).

Peabody v Federal Commissioner of Inland Revenue [1992] 24 ATR 58 (FCA).

Peate v Commissioner of Taxation of Commonwealth of Australia [1966] UKPC 8, [1967] 1 AC 308 (PC).

Re Maya Hazfa v Director-General of Social Security [1985] FCA 164, (1985) 6 FCR 444.

Webb v R (1994) 181 CLR 41 (HCA).

United Kingdom

Bird v Inland Revenue Commissioners [1989] AC 300 (HL).

Black Nominees Ltd v Nicol [1975] 50 TC 229 (Ch.).

Cleary v Inland Revenue Commissioners [1966] Ch 365.

Cleary v Inland Revenue Commissioners [1968] AC 766.

Commissioner of Inland Revenue v Burmah Oil Co [1980] 54 TC 200 (HL).

Inland Revenue Commissioners v Duke of Westminster [1936] AC 1 (HL).

Craven v White [1989] AC 398 (HL).

Furness (Inspector of Taxes) v Dawson [1984] AC 474 (HL).

Herbert v Inland Revenue Commissioners [1943] KB 288 (HL).

Inland Revenue Commissioners v Brooks [1915] AC 478 (CA).

MacNiven (HM Inspector of Taxes) v Westmorland Investments Ltd [2001] UKHL 6, [2003] 1 AC 311.

Porter v McGill [2001] UKHL 67, [2002] 1 All ER 465.

R v Gough [1993] AC 646 (HL).

R v Inland Revenue Commissioners, ex parte Preston [1985] AC 835 (HL).

R v Inland Revenue Commissioners, ex parte Rossminster Ltd [1980] AC 952 (HL).

R v Monopolies Commission, Ex parte Argyll [1986] 2 All ER 257 (CA).

Salomon v Salomon & Co Ltd [1897] AC 22 (HL).

Snook v London West Riding Investments Ltd [1967] 2 QB 786 (CA).

The Cape Brandy Syndicate v Commissioner of Inland Revenue [1921] 1 KB 64 (CA).

Vestey v Inland Revenue Commissioners (No.s 1 and 2) [1980] AC 1148 (HL).

Wallersteiner v Moir [1974] 1 WLR 991 (CA).

W T Ramsay Ltd v Inland Revenue Commissioners [1979] 3 All ER 213 (CA).

W T Ramsay Ltd v Inland Revenue Commissioners [1981] STC 174 (HL).

WT Ramsay Ltd v Inland Revenue Commissioners [1982] AC 300 (HL).

United States

Liteky v United States 510 US 540 (1994).

Massachusetts School of Law v American Bar Association (1997) 107 F 3d 1026 (3rd circuit 1997).

Phillips v Joint Legis. Comm. On Performance and Expenditure Review (1981) 637 F.2d 1014 (5th circuit 1981).

Case Submissions

Russell, Mr J G, "Submissions of Appellant", (8 February 2011) in CA 65/09.

Russell, Mr J G, "Closing Submissions" (1 February 2012) in CA 654/2010.

Both of these cases relate to the 'Track E' litigation in the Court of Appeal: *Russell v Commissioner of Inland Revenue* [2012] NZCA 128, (2012) 25 NZTC 20,120 (CA).

Legislation

New Zealand

Acts Interpretation Act 1924.
Companies Act 1955.
Companies Act 1993.
Companies Special Investigations Act 1958.
Corporations (Investigations and Management) Act 1989.
Crimes Act 1961.
Crown Entities Act 2004.
Evidence Amendment Act (No. 2) 1980.
Evidence Act 2006.
Goods and Services Tax Act 1985.
Income Tax Act 1976.
Income Tax Act 1994.
Income Tax Act 2004.
Income Tax Act 2007.
Income Tax Amendment Act 1980.
Inland Revenue Department Act 1974.
Judicature Amendment Act 1972.
Judicature Amendment Act 2008.
Land and Income Tax Act 1954.
Land and Income Tax Amendment Act 1920.
Land and Income Tax Amendment Act 1922.
Land and Income Tax Amendment Act 1936.
Land and Income Tax Amendment Act (No.2) 1969.
New Zealand Bill of Rights Act 1990.
Oaths and Declarations Act 1957.
Official Information Act 1982.
Public Finance Act 1989.
Receiverships Act 1993.
Supreme Court Act 2003.
Tax Administration Act 1994.
Taxation Review Authorities Act 1994.

United Kingdom

Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (UK).

Books

Beck, Andrew and Borrowdale, Andrew, *Guidebook to New Zealand Companies and Securities Law*, (6th ed, CCH New Zealand Ltd, Auckland, 1998).

Bentley, Duncan (ed.) *Taxpayers' Rights: An International Perspective* (Revenue Law Journal School of Law, Bond University, Queensland, 1998).

Bingham, T.H., *The Business of Judging: Selected Essays and Speeches* (Oxford, Oxford University Publishing, 2011).

Boucher, T. P. W., *Blatant, artificial and contrived: tax schemes of the 70s and 80s* (1st ed, Australian Taxation Office, 2010).

Braithwaite, Valerie, "A New Approach to Tax Compliance" in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, Hants and Burlington, 2003).

Braithwaite, Valerie; Schneider, Friedrich; Reinhart, Monika; and Murphy, Kristina, "Charting the Shoals of the Cash Economy" in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Avoidance and Evasion* (Ashgate, Hants and Burlington, 2003).

Braithwaite, Valerie, "Dancing with Tax Authorities: Motivational Postures and Noncompliant Actions" in Valerie Braithwaite (ed.) *Taxing Democracy: Understanding Tax Avoidance and Evasion*, (Ashgate, Hants and Burlington, 2003).

Braithwaite, Valerie, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy*", (Edward Elgar Publishing, Cheltenham 2009).

Braithwaite, Valerie (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, Hants and Burlington, 2003).

Cane, Peter; and Kritzer, Herbert M., *The Oxford Handbook of Empirical Legal Research*, (Oxford University Press, Oxford, 2012).

Coleman J, *Tax Avoidance Law in New Zealand*, (CCH New Zealand Ltd, Auckland, 2009).

Devlin, P. *The Judge* (Oxford, Oxford University Press, 1979).

Elliffe, C., 'Tax Fraud: When is Tax Avoidance a Criminal Offence?' in Andrew Maples and Adrian Sawyer (eds) *Taxation Issues: Existing and Emerging*, (The Centre for Commercial and Corporate Law, Christchurch, 2011).

Flamm, Richard E., *Judicial Disqualification: Recusal and Disqualification of Judges* (2nd ed., Banks and Jordan Publishing Company, Boston, 2007).

Gallavin, C., *Evidence*, (Lexis Nexis NZ Ltd, Wellington, 2008).

Council of the Chief Justices of Australia, *Guide to Judicial Conduct* (2nd ed, Melbourne, Australasian Institute of Judicial Administration, 2007).

Hammond, Hon Justice R. Grant, *Judicial Recusal, Principles, Process and Problems*, (Hart Publishing Ltd, Oxford, 2009).

[redacted]

Hodson, A., "Tax Administration" in *New Zealand Taxation: Principles, Cases and Questions* (Thomson Brookers, Wellington, 2012).

Hunt, Graeme, *Hustlers, Rogues and Bubble Boys: White-Collar Mischief in New Zealand*, (Reed Publishing (NZ) Ltd, Auckland, 2001).

Joseph, Philip A., *Constitutional & Administrative Law in New Zealand*, (3rd edition, Thomson Brookers, Wellington, 2007).

Keating, Mark, *Tax Disputes in New Zealand: A Practical Guide*, (CCH New Zealand, Auckland, 2012).

Kidder, R. and McEwen, C. "Taxpaying behaviour in social context: A tentative typology of tax compliance and noncompliance" in J Roth & J Scholz (eds.) *Taxpayer compliance* (Vol. 2, University of Pennsylvania Press, Philadelphia, 1989).

King, T., *The Truth about Stories: A Native Narrative* (Anansi Press, Toronto, 2003).

Lymer, Andrew and Oats, Lynne, *Taxation: Policy and Practice* (14th ed, Fiscal Publications, Birmingham, 2008).

McBarnet, Doreen, "When Compliance is not the Solution but the Problem: From Changes in Law to Changes in Attitude" in Valerie Braithwaite (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, Hants and Burlington, 2003).

MacCulloch, John (ed.): Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (Ward Lock and Co., London, [1875]).

McKerchar, Margaret, *Design and Conduct of Research in Tax, Law and Accounting*, (Thomson Reuters/Lawbook Co., Sydney, 2010).

Maples, Andrew and Sawyer, Adrian (eds.), *Taxation Issues: Existing and Emerging*, (The Centre for Commercial and Corporate Law, Christchurch, 2011).

Master Tax Guide, (CCH New Zealand Ltd, Auckland, 2012).

New Zealand Taxation: Principles, Cases and Questions (Thomson Brookers, Wellington, 2012).

New Zealand Taxation: Principles, Cases and Questions (Thomson Brookers, Wellington, 2011).

Prebble, J., *Income Tax Law: Concepts and Cases* (Butterworths, Wellington, 1994).

Salter, M. and Mason J., *Writing Law Dissertations, An Introduction and Guide to the Conduct of Legal Research*, (1st ed, Pearson Education Ltd, Essex, 2007).

Spiller, P., Finn, J., Boast, R., *A New Zealand Legal History*", (2nd ed., Brookers Ltd, Wellington, 2001).

Taylor, G. D.S., *Judicial Review: A New Zealand Perspective*, (2nd ed., LexisNexis NZ Ltd, Wellington, 2010).

Tutt, Nigel, *A History of Tax Avoidance* (Wisedene Ltd, London, 1989).

Yin, R.K., *Case Study Research: Design and Methods* (3rd ed, Sage Publications, Beverley Hills, 2003).

Articles/Journal Articles

Allingham, M.G. and Sandmo, A., "Income Tax Evasion: A Theoretical Analysis" (1972) 1 *Journal of Public Economics* 323.

Baldry, J.C., "Income tax evasion and the tax schedule: Some experimental results" (1987) 42 *Public Finance/ Finances Publiques* 357.

Blanchard, G., "The Case For A Simplified Tax Dispute Resolution Process" (June 2005) 11 (4) NZJTLP 417.

Brown, Brendan, "The moving goalposts of tax avoidance" (24 February 2012) *New Zealand Lawyer* 15.

Burton, Mark, "Responsive Regulation and the Uncertainty of Tax Law – Time to Reconsider the Commissioner's Model of Cooperative Compliance?" (2007) 5 eJournal of Tax Research 71.

Caldwell, John, "Judicial Review: The Fading of Remedial Discretion?" (2009) NZULR 489.

Chua, Wai Fong, "Radical Developments in Accounting Thought" (1986) 61 The Accounting Review 601.

Coleman, James, "IRD Unwisely Thumbs its Nose at the Court" (February 2009) Taxation Today, Accessed from *www.jhcoleman.co.nz/articles/ird_unwisely_thumbs_its_nose_at_the_court/* on 8 August 2011.

Coleman, James, "Tax Update – James Coleman, Barrister, Wellington examines the legacy of two decades of Russell litigation" [2012] NZLJ 290.

Coleman, James, "Tax update: James Coleman, Barrister, Wellington looks at judicial review and asks: what amounts to abuse of process?" [2008] NZLJ 395.

Coleman, James, "When Tax Administration Goes Wrong" (July 2010) Taxation Today 17.

Cullen, Robbie, "Settling tax disputes – the effect of litigation risk", (August 1999) *NZ Tax Planning Reports* 1.

Delany, T., "Tax avoidance – A Trans-Tasman Comparative Study", (June 2005) 11 (2) NZJTLP 161.

Goodall, Jason, “The Duke of Westminster’s fall from grace” (March 2002) 8 NZJTLP 7.

Dunbar, D., “Judicial Techniques for Controlling the New Zealand General Anti-Avoidance Rule: The Scheme and Purpose Approach, from *Challenge* to *Peterson*” (2006) 12 NZJTLP 324.

Eden, Sandra and Freedman, Judith, “Editorial: Special Issue on Overseas Judicial Anti-avoidance Developments” [2009] BTR 159.

Elliffe, C. and Cameron J., “The Test for Tax Avoidance in New Zealand: A Judicial Sea Change” (2010) 16 NZBLQ 440.

Graetz, M.J., Reinganum, J.F. and Wilde, L.L., “The tax compliance game: Toward an interactive theory of tax enforcement” (1986) 2 *Journal of Law, Economics and Organization* 1.

Griffiths, S., “No discretion should be unconstrained”: Considering the “care and management” of Taxes and the Settlement of Tax Disputes in New Zealand and the UK” [2012] BTR 167.

“Grouping of Losses” (1 October 1980) NZ Tax Planning Reports 4.

Harding, Matthew and Ian Malkin, “Overruling in the High Court of Australia in Common Law Cases” (2010) 34 MULR 519.

Harley, Geoff, “Collecting Taxes” (2002) 33 (3) VUWLR 333.

Hasseldine, John, “The Costs of Compliance” (September 1989) 68 The Accountants’ Journal 60.

Hasseldine, John and Bebbington, Jan, “Blending Economic Deterrence and Fiscal Psychology Models in the Design of Responses to Tax Evasion” (1991) 12 Journal of Economic Psychology 299.

Hodson, Alistair, “Track A to E Alphabet Soup: John Russell’s Still Cooking!” (2011) 6 Journal of the Australasian Tax Teachers’ Association 68.

Hodson, Alistair, “Two Interesting Challenges to the Commissioner’s Use of Section 17 Notices” (June 2007) 13 NZJTLP 211.

Jackson, B.R and Milliron, V.C “Tax Compliance Research: Findings, Problems and Prospects”, (1986) 5 *Journal of Accounting Literature* 125.

Karp, David R., "The Judicial & Judicious Use of Shame Penalties" (1998) 44 Crime and Delinquency 277.

Keating, M., "Deemed Acceptance of Taxpayers' Notices of Proposed Adjustment" (December 2005) 11 NZJTLP 397.

Keating, M., "New Zealand's Tax Dispute Procedure – Time for a Change" (2008) 14 NZJTLP 425.

Keating, M., "The Use of the Commissioner's Powers during Litigation" (2007) 13 NZJTLP 195.

Kirchler, E., Hoelzl, E. and Wahl, I., "Enforced versus voluntary compliance: The "slippery slope" framework" (2008) 29 *Journal of Economic Psychology* 210.

Lennard, Michael, "How Long to Resolution? Delay in Dispute Resolution Process", August 2008, *www.mikelennard.com/?t=32* (Accessed 4/1/2013).

Lennard, Michael, "Wham Bam, It's a Sham" [2007] Taxation Today 1. (Accessed through *http://www.mikelennard.com/?t=21* on 3/1/2013).

"Loss Companies and sec. 99" (4 August 1980) NZ Tax Planning Reports 3.

MacLaren K and Keating, M., "The Settlement of Tax Disputes: The Commissioner is Able But Not Willing" (2009) 15 NZJTLP 323.

McDonald, Liz, "Slashed insurance payouts 'costing city millions' ", *The Press* (Christchurch, 18 December 2012).

McGee, R.W., "Is Tax Evasion Unethical? (1994) 42 (2) University of Kansas Law Review 411.

McKerchar, Margaret, "Why Do Taxpayers Comply? Past Lessons and Future Directions in Developing a Model of Compliance Behaviour" (2001) 16 ATF 99.

Merriam-Webster Dictionary, Definition of "vendetta", (11th edition, Springfield, 2005).

Offen, T, "It Still Comes Back to the Smell" (2001) 80 Chartered Accountants Journal 30.

Ogden, Darise, "Court of Appeal confirms established principles for judicial review in tax cases" (6 March 2009) 107 NZ Lawyer 1. Accessed from *www.nzlawyermagazine.co.nz/Archives/Issue107/N5/tabid/1621/Default.aspx* on 8 August 2011.

Pope, Jeff and Mohdali, Raihana, "The role of religiosity in tax morale and tax compliance" (2010) 25 ATF 369.

Prebble, J., "Criminal law, tax evasion, shams, and tax avoidance, Part II: Criminal Law consequences of categories of evasion and avoidance" (1996) 2 NZJTLP 59.

Prebble, J., "*Practical Problems from Publication of the Commissioner's Interpretation Guidelines*", (2002) Working Paper Series, Working Paper No. 8, Faculty of Law, Victoria University of Wellington. (Accessed from *http://researcharchive.vuw.ac.nz/bitstream/handle/10063/194/paper.pdf.txt?sequence=4* on 22/4/2010).

Prebble, R., "Tax Avoidance, Common Law & Civil Law: Comparative Approach" (2005-2006) 2 IJOTALFIPAS 1.

Richardson, Rt Hon Sir Ivor LM, "Countering Tax Avoidance" (2004) 10 NZJTLP 301.

Richardson, M. and Sawyer, A.J., "A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Prospects" (2001) 16 ATF 137.

Sawyer, A.J., "A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries: Have New Zealand Taxpayers Been "Short-Changed"?" (1999) 32 *Vanderbilt Journal of Transnational Law* 1345.

Scotchmer, S. and Slemrod, J., "Randomness in tax enforcement" (1989) 38 *Journal of Public Economics* 17.

Song, Y.D. and Yarbrough, T.E. "Tax ethics and taxpayer attitudes: A survey" (1978) 38 *Public Administration Review* 442.

Spilker, Brian; Worsham, Ronald; and Prawitt, Douglas, "Tax Professionals' Interpretations of Ambiguity in Compliance and Planning Decision Contexts" (1999) 21 The Journal of the American Taxation Association 75.

Tan, LM, "Taxpayers' preference for type of advice from tax practitioner: A Preliminary examination" (1999) 20 Journal of Economic Psychology 431.

"Tax Loss Companies" (1 February 1980) NZ Tax Planning Reports 2.

"Tax Losses" (1 October 1980) NZ Tax Planning Reports 3.

"The Amendment Act, 1 October 1980: A Mixed Bag: Tough, Retrospective, Unclear" (5 October 1980) NZ Tax Planning Reports 1.

Trombitas, Eugen, "Legitimate Tax Planning and the Choice Principle: Some Thoughts Following Recent Cases" (2002) 8 NZJLP 48.

Trombitas, Eugen, "The General Anti-Avoidance Rule and the "Ten Commandments" – Eternal Tax Dilemma No More? Case Comment on *Canada Trustco Mortgage Co v R*" (2005) 11 NZJTLP 407.

Tax Education Office, "Company Net Losses: Carry Forward and Grouping" (20 December 1996) 127 Tax Education Office Newsletter 1.

Vial, P., "Use of Money Interest: A Fair Deal for Taxpayers?" (November 2011) *Taxation Today* 22.

Witte, A.D., and Woodbury, D.F., "The Effect of Tax Laws and Tax Administration on Tax Compliance," (1985) 38 *National Tax Journal* 1.

Inland Revenue Tax Information Bulletins

Tax Information Bulletin, Volume 1, No. 5 (November 1989).
Tax Information Bulletin, Volume 1, No. 8 (February 1990).
Tax Information Bulletin, Volume 4, No. 5 (December 1992).
Tax Information Bulletin, Volume 6, No. 3 (September 1994).
Tax Information Bulletin, Volume 7, No. 5 (November 1995).
Tax Information Bulletin, Volume 8, No. 7 October 1996.
Tax Information Bulletin, Volume 9, No. 6 (June 1997).
Tax Information Bulletin, Volume 9, No. 11 (November 1997).
Tax Information Bulletin, Volume 10, No. 5 (May 1998).
Tax Information Bulletin, Volume 10, No. 10 (October 1998).
Tax Information Bulletin, Volume 11, No. 9 (October 1999).
Tax Information Bulletin, Volume 11, No. 10 (November1999).
Tax Information Bulletin, Volume 13, No. 4 (April 2001).
Tax Information Bulletin, Volume 13, No. 8 (August 2001).
Tax Information Bulletin, Volume 14, No. 5 (May 2002).
Tax Information Bulletin, Volume 14, No. 9 (September 2002).

Tax Information Bulletin, Volume 14, No. 11 (November 2002).
Tax Information Bulletin, Volume 15, No. 1 (January 2003).
Tax Information Bulletin, Volume 15, No. 2 (February 2003).
Tax Information Bulletin, Volume 15, No. 10 (October 2003).
Tax Information Bulletin, Volume 16, No. 1 (February 2004).
Tax Information Bulletin, Volume 16, No. 2 (March 2004).
Tax Information Bulletin, Volume 16, No. 3 (April 2004).
Tax Information Bulletin, Volume 16, No. 4 (May 2004).
Tax Information Bulletin, Volume 16, No. 5 (June 2004).
Tax Information Bulletin, Volume 16, No. 8 (September 2004).
Tax Information Bulletin, Volume 17, No.6 (August 2005).
Tax Information Bulletin, Volume 17, No. 8 (October 2005).
Tax Information Bulletin, Volume 18, No. 5 (June 2006).
Tax Information Bulletin, Volume 18, No. 6 (July 2006).
Tax Information Bulletin, Volume 21, No. 1 (March 2009).
Tax Information Bulletin, Volume 21, No. 8 Part 1 (October / November 2009).
Tax Information Bulletin, Volume 22, No. 4 (May 2010).
Tax Information Bulletin, Volume 22, No. 7 (August 2010).

Newspaper Articles

Article about Mr Clyne in Sydney Morning Herald, (Sydney, August 3 1982).

Berry, Michael, "Judge 'unbiased' despite clown comment", *The Press*, (online ed., Christchurch, 26 November 2012).

Corbett, Jan, "J G Russell's tax dodges risky, accountant opined" *The Independent* (online ed., New Zealand, 11 October 1996).

Gregor, Kelly, "Directors 'could be liable' for company tax bills" *The New Zealand Herald*, (online ed., New Zealand, 28 July 2010).

"High Court changes tax avoidance ruling", *The Sydney Morning Herald*, (Sydney, February 9, 1989).

"John Russell took novel approaches" *The National Business Review* (online ed., New Zealand, 8 May 1998).

Krause, Nick, "Accountant is relaxed about huge tax claim", *The Dominion Post* (2nd ed., New Zealand, 11 August 2010).

Krause, Nick, "IRD lawyer under fire for too much detail in tax case" *The Dominion Post* (online ed., New Zealand, 31 July 2010).

Krause, Nick, "Lawyer says IRD's evidence is vague" *The Press* (online ed., Christchurch, 4 August 2010).

Mace, William, "$138m tax bill appeal thrown out" *The Dominion Post,* (2nd ed., New Zealand, 21 April 2011).

Mace, William, "Russell continues 30 year tax battle", *The Press*, (online ed., Christchurch, 29 April 2011).

"Pointless tax appeal turned down", *The Independent*, (Auckland, 8 March 2006).

Ross, Mike, "Thousands of individuals to pay as tax schemes are unravelled" *The National Business Review*, (online ed., New Zealand, 8 May 1998).

Sinoski, Kelly, "Meet John George Russell", *The Independent*, (Auckland, 2 March 2005).

Sinoski, Kelly, "Russell fights to sue IRD" *The Independent* (Auckland, 10 May 2006).

"Tax expert fails to get judge to step aside", *The National Business Review*, (online ed., New Zealand, 27 February 2009).

"The artful dodger" *The New Zealand Herald* (online ed., New Zealand, 26 May 2001).

"The merchant banker's banker", *New Zealand Herald*, (online ed., New Zealand, 16 October 2004).

Watt, Andrew, "Taxman goes on warpath" The Independent (online ed., United Kingdom, 21 May 1995).

Reports

Braithwaite, Valerie; Reinhart, Monika; and McCrae, Jason, "Game Playing with Tax Law" (2004) *http://regnet.anu.ed.au/publications/game-playing-tax-law* ANU College of Asia and the Pacific (Accessed on 7/1/2012).

Australian Taxation Office "Improving Tax Compliance in the Cash Economy", (12 May 1997) *www.ato.gov.au/content/39065.htm* (Accessed on 7/1/2012).

Australian Taxation Office, "Improving Tax Compliance in the Cash Economy", (April 1998) *www.ato.gov.au/content/downloads/sb39073.pdf* (Accessed on 7/1/2012).

Joint submission by the Taxation Committee of the New Zealand Law Society (NZLS) and National Tax Committee of the New Zealand Institute of Chartered Accountants (NZICA) on "The Disputes Resolution Procedures in Part 4A of the Tax Administration Act 1994 and the Challenge Procedures in Part 8A of the TAA 1994" (4 August 2008).

NZLS and NZICA joint submission to Inland Revenue on "Disputes: A Review – An Officials' Issues Paper" (July 2010; 3 September 2010).

Owen, R.E., "Taxation in New Zealand: Report to the Taxation Review Committee" (Government Printer, Wellington, 1967).

Theses

Rebecca Chieh Wu, "*A Study on the Appropriateness for adopting 'Universal' Definitions for Tax Compliance and Non-Compliance: A New Zealand Case Study Approach*", (Master of Commerce thesis, University of Canterbury 2012).

Conference Papers

[redacted]

Clews, G D, "The Richardson Years: An Overview of Case Law Affecting the Commissioner's Statutory Powers", (paper presented to the International Fiscal Association Conference, New Zealand, 2002). Accessed through *www.tax.counsel.co.nz/Resources/Publications+papers+and+commentary/The+Richardson+Years* on 3 August 2011.

Greggi, Marco, "Avoidance, Evasion and *abus de droit*: an (also linguistic) issue under European tax law", (paper presented to Tax Research Network Conference, Sheffield, 2007).

Hodson, A. G., "'*Sticks and Stones*' – *The Social Cost of New Zealand's First Two Supreme Court Tax Avoidance Decisions: Is a Scheme Disclosure Provision the Way Forward for New Zealand?*", (Working paper presented at the Tax Research Network Conference (TRN), Cardiff University, September 2009).

Internet

Business Day, "Ex-Securiticorp boss' $138m tax bill was 'wrong in law'" (27 July 2010) accessed (Accessed via *http://www.stuff.co.nz/business/3959498/Ex-Securiticorp-boss-138-tax-bill-was-wrong-in-law* on 29/7/2010).

Companies Office, *http://www.business.govt.nz/companies* (Accessed on 1/1/2013).

Fletcher Challenge Archives, *http://www.fclarchives.co.nz/companies.php* (Accessed on 31/3/2010).

HM Revenue and Customs (UK), *www.hmrc.gov.uk* (Accessed on 26/12/2012).

Hunt, Daniel, "J G Russell 30 years on – is the IRD ever going to give up?" (6 August 2010) Talktax *http://www.talktax.co.nz/index.php/2010/jg-russell-30-years-on/* (Accessed on 24/7/2011).

IRD, *www.ird.govt.nz* (Accessed on 4/1/2013).

Krause, Nick, "Russell had 'cash box' court told" *BusinessDay.co.nz* (online ed., New Zealand, 28 July 2010).

Ministry of Justice, "Supreme Court of New Zealand" *http://www.justice.govt.nz/courts/the-supreme-court/Index* (Accessed on 23/12/2012).

New Zealand Historic Places Trust, "Dilworth Building" *www.historic.org.nz/TheRegisterSearch/RegisterResults.aspx?RID=4600* (Accessed on 27/4/2010).

Queens Arcade, "Queens Arcade – History" *www.queensarcade.co.nz/history.html* (Accessed on 27/4/2010).

Business Information, *www.business.govt.nz* (Accessed on 27/12/2012).

Lectures

Epstein, Richard A., "What Do We Mean by the Rule of Law?" (Legal Research Foundation, Auckland, 5 August 2004). (First Published by the New Zealand Business Roundtable, Wellington in 2005).

Tiley, J., "Managing Tax Avoidance: Recent UK experience", (Annual Lecture, Melbourne, August 2007).

Interviews

Interview with Valerie Braithwaite, Professor at ANU, (the author, Canberra, 4 December 2008).

Interview with Mr John Russell, Subject of thesis, (the author, Kawakawa Bay, 27 January 2010).

Interview with Mr John Russell, Subject of thesis, (the author, Kawakawa Bay, 27 April 2010).

Interview with Mr John Russell, Subject of thesis, (the author, Kawakawa Bay, 29/30 April 2010).

Interview with Mr John Russell, Subject of thesis, (the author, University of Canterbury, 27 July 2011) Tape 1:59 minutes.

Interview with Mr John Russell, Subject of thesis, (the author, University of Canterbury, 27 July 2011) Tape 2:63 minutes.

Interview with Mr J G Russell, Subject of thesis, (the author, University of Canterbury, 27 July 2011) Tape 3:32 minutes.

Interview with Mr J G Russell, Subject of thesis, (the author, University of Canterbury, 27 July 2011) Tape 4:60 minutes.

Interview with Mr J G Russell, Subject of thesis, (the author, University of Canterbury, 27 July 2011) Tape 5:29 minutes.

Interview with Mr John Russell, Subject of thesis, (the author, University of Canterbury, 28 July 2011) Tape 6:51 minutes (filmed live in lecture with students).

Interview with Mr J G Russell, Subject of thesis, (the author, University of Canterbury, 28 July 2011) Tape 7: 6 minutes (filmed live in lecture with students).

Telephone interview with Mr John Russell, Subject of thesis, (the author, 16 November 2012).

Telephone interview with Mr John Russell, Subject of thesis, (the author, 5 December 2012).

[redacted]

Letters (Some contained in the IRD reports)

[redacted]

Letter from IRD to Charity Construction Ltd (Mr Russell) (26 September 1996).

Letter from IRD to FB Duvall Ltd (31 May 2005).

Letter from IRD to John Russell (19 November 2008).

Letter from IRD to Money Market Securities Ltd (Mr Russell) (7 October 1996).

[redacted]

Letter from John Russell to the Commissioner, (8 September 1988).

Letter from John Russell to the Commissioner, (25 April 1989).

[redacted]

[redacted]

Letter from Mr Russell to Inland Revenue (February 2009).

[redacted]

Inland Revenue Reports and Other Material

Commissioner's Policy Statement (CPS) (1990), "Policy Statement on Section 99 [ITA 1976]", (February 1990) in Appendix C to IRD Tax Information Bulletin, Volume 1, No. 8, (February 1990).

Revenue Alert RA 10/01 (2010).

Revenue Alert RA 11/02 (2011).

Inland Revenue Reports

[redacted]

INA0009: "Interpretation of Sections BG 1 and GB 1 of the Income Tax Act 2004", Exposure Draft for External Consultation – for Comment and Discussion only (2004) (originally accessed via *www.ird.govt.nz*).

Inland Revenue, *IR 504:* "Helping you get it right", Inland Revenue's Compliance Focus 2011-2012 (July 2011).

Inland Revenue, *IR 504:* "Helping you get it right", Inland Revenue's Compliance Focus 2011-2012 (August 2012).

Inland Revenue (Public Rulings Unit of the Chief Tax Counsel) "Interpretation Statement Draft for Comment and Discussion: Tax Avoidance and the Interpretation of Sections BG 1 and GA 1 of the Income Tax Act 2007", Exposure Draft on Section BG 1, (16 December 2011).

[redacted]

[redacted]

Memorandums

[redacted]

Inland Revenue Standard Practice Statements and Other Documents

GNL 170: Release of Information (September 2001).
GNL 440: Section 17 notices (August 2004) (withdrawn).
INV 100: Transitional issues (September 1996) (withdrawn).
INV 170: Timeliness in resolving tax disputes (February 2002) (withdrawn).
INV 205: Unacceptable interpretation (March 1998) (withdrawn from 1 April 2003, in relation to tax positions taken on or after 1 April 2003).
INV 206: Unacceptable interpretation - non application of a tax law (March 1998) (withdrawn from 1 April 2003, in relation to tax positions taken on or after 1 April 2003).
INV 215: Abusive tax position (March 1998) (withdrawn from 1 April 2003, in relation to tax positions taken on or after 1 April 2003).
INV 220: Evasion or similar act (March 1998) (withdrawn from 1 April 2003, in relation to tax positions taken on or after 1 April 2003).
INV 225: Criminal offence – evasion or similar offences (March 1998).
INV 290: Promoter Penalties (March 2004).
INV 300: Acceptance of late objections under section 126 of the Tax Administration Act 1994 (March 1997) (withdrawn).
INV 321: Section 17 notices (October 1999) (withdrawn).
INV 500: Taxpayer amendments to tax returns (October 1999) (withdrawn).
INV 510: Requests to amend assessments (August 2002) (withdrawn).
IR949: Inland Revenue Statement of Account for Mr J G Russell, issued 22 April 2010.
IR949: Mr Russell's personal Statement of Account issued 17 August 2012 for an amount of $200,182,178.18.

IS0055: Shortfall penalty – unacceptable interpretation and unacceptable tax position (October 2005).

IS0061: Shortfall penalty for taking an abusive tax position (December 2005).

IS0062: Shortfall penalty – Evasion (November 2006).

IS 10/07: Care and management of the taxes covered by the Inland Revenue Acts (2010).

RDC 2.1: Remission of penalties and interest (September 1999) (withdrawn).

RDC 2: Remission of penalties and interest (December 1997) (withdrawn).

SPS 05/01: Late filing penalty (February 2005) (withdrawn).

SPS 05/03: Dispute resolution process commenced by the Commissioner of Inland Revenue (April 2005) (withdrawn).

SPS 05/04: Dispute resolution process commenced by a taxpayer (April 2005) (withdrawn).

SPS 05/07: Non-disclosure right for tax advice documents (2005).

SPS 05/08: Section 17 Notices (July 2005).

SPS 05/10: Remission of penalties and interest (October 2005).

SPS 05/11: Instalment arrangements for payment of tax debt (November 2005) (withdrawn).

SPS 05/12: Loss offset elections between group companies (February 2006).

SPS 06/02: Writing off outstanding tax (May 2006).

SPS 08/01: Dispute resolution process commenced by the Commissioner of Inland Revenue (June 2008) (withdrawn).

SPS 08/02: Dispute resolution process commenced by a taxpayer (June 2008) (withdrawn).

SPS 10/04: Dispute resolution process commenced by the Commissioner of Inland Revenue (November 2010) (withdrawn).

SPS 10/05: Dispute resolution process commenced by a taxpayer (November 2010) (withdrawn).

SPS 11/01: Instalment arrangements for payment of tax (February 2011).

SPS 11/05: Disputes resolution process commenced by the Commissioner of Inland Revenue (2011).

SPS 11/06: Disputes resolution process commenced by a taxpayer (2011).

SPS 11/07: Application of discretion in section 81(1B) of the Tax Administration Act 1994 – the secrecy provisions (2012).

SPS 12/02: Late filing penalty (May 2012).

Appendices

XV Appendices

Appendix 1: Initial letter to Mr John Russell

College of Business and Economics

Alistair Hodson
Department of Accounting and Information Systems
Tel: +64 3 364 2987 ext 7377, Fax: + 64 3 364 2727
Email: alistair.hodson@canterbury.ac.nz

UNIVERSITY OF CANTERBURY
Te Whare Wānanga o Waitaha
CHRISTCHURCH NEW ZEALAND

16 December 2009

Mr J G Russell,
1439 Clevedon-Kawakawa Bay Road,
RD 5,
Papakura 2585.

Dear Mr Russell,

My name is Alistair Hodson and I lecture in taxation at the University of Canterbury in Christchurch. I am writing to you as I have been intrigued by the so called 'Russell template' litigation over the last few years, as well as the vendetta issues raised in relation to Inland Revenue's conduct toward you.

As part of my research I would seek to discuss the template cases with you and the impact that they and yourself have had on New Zealand tax jurisprudence.

My aim is to gain a fuller understanding of the tax template itself, your background, as well as discuss any issues that you may wish to raise. I read several comments made to a reporter about you in *The Independent* in 2005 that have been the catalyst in sparking my interest. You were described by the former head of the Justice Department's corporate investigations unit as an enigma, always pleasant to deal with, and whatever you did was well researched.

I would love to have the opportunity to come and meet you if at all possible.

I am able to fly up to Auckland at a time that suits you if you are willing to meet with me. I will telephone you in the next few days, but if you wanted to contact me for clarification or wish to know about my background, then please feel free to email at the above address.

I look forward to making contact with you in the near future and hopefully to be able to meet you in person in the New Year.

Yours sincerely,

Alistair Hodson,
Department of Accounting and Information Systems,
University of Canterbury,
Private Bag 4800,
Christchurch 8140.

Appendix 2: Human Ethics Approval

Human Ethics Committee
Tel: +64 3 364 2241, Fax: +64 3 364 2856, Email: human-ethics@canterbury.ac.nz

UNIVERSITY OF CANTERBURY
Te Whare Wānanga o Waitaha
CHRISTCHURCH NEW ZEALAND

Ref: HEC 2010/LR/01

11 February 2010

Alistair Hodson
School of Law
UNIVERSITY OF CANTERBURY

Dear Alistair

Thank you for forwarding to the Human Ethics Committee a copy of the low risk application you have recently made for your research proposal "John George Russell and his impact on New Zealand tax jurisprudence: An investigative analysis.".

Due to the nature of the questions (especially where the interviewee is being asked to comment on other individuals), and the fact that there is still outstanding litigation between the participant and Inland Revenue, this is not considered to be low risk research and will require the review of the full committee. Please complete and return 12 copies of the full application form which can be found on the HEC's website.

Yours sincerely

pp Dr Michael Grimshaw
Chair, Human Ethics Committee

COMMERCIAL MANAGEMENT

1439 Clevedon-Kawakawa Bay Road
R.D.5., Papakura, Auckland 2585

Phone (09) 292 2114
Fax (09) 292 2114

FAXED

FACSIMILE MESSAGE

TO: Alistair Hodson

FAX NO: (03) 364 2745 and #(03) 364 2727

FROM: John Russell

RE: Privacy considerations.

NO. OF PAGES (INCLUDING THIS PAGE): 1

DATE: 21/2/2010

In respect of matters of confidentiality discussed by telephone on Friday 19th I have no problem with such matters and the explanation of University procedures and protocols sound more than adequate to me.

I confirm my telephone discussion to the effect that I do not require anything I say to be treated as secret or confidential. My opinions may not necessarily be correct in the eyes of others, but they are honestly held, and because this is still a relatively free country and I am officially retired I see no reason why I should not express them to anybody that is interested.

As a consequence, I have no problem with anything arising from our discussions to be used by you or the University in any way you see fit. I suggest that if anyone has any misgivings about anything in particular simply discuss it with me if thought appropriate to obtain my view on that issue.

Regards, John Russell

21/02/2010 20:11 64-9-2922114 COMMERCIALMANAGEMENT PAGE 01
21/02/2010 21:07 64 9 2922114

College of Business and Economics

Alistair Hodson
Department of Accounting and Information Systems
Tel: +64 3 364 2987 ext 7377, Fax: + 64 3 364 2727
Email: alistair.hodson@canterbury.ac.nz

UC UNIVERSITY OF CANTERBURY
Te Whare Wānanga o Waitaha
CHRISTCHURCH NEW ZEALAND

1 April 2010

University of Canterbury - Human Ethics Consent Form

Dear Mr Russell,

Further to your earlier consent form dated 21 February 2010 the University of Canterbury Human Ethics Committee requires that I bring the following items to your attention and seek your consent:

Re LLM Thesis:

'John George Russell and his Impact on New Zealand Tax Jurisprudence: An Investigative Analysis'

This application has been reviewed and approved by the University of Canterbury Human Ethics Committee.

I would like to make you aware that an LLM thesis is a public document available via the University of Canterbury Library database.

The audio recording and possible future video recording that I conduct may be used in the future either as a teaching resource or utilised in a prospective biography of you.

Please note that you may withdraw participation at any time including the withdrawal of any data already provided to me.

The recordings of conversation to date will be stored on computer hard drive and memory stick for future access. The recordings will be kept in a secure office indefinitely.

Contact details of researcher and supervisors:

Researcher: Alistair Hodson, (telephone 3642987 extension 7377)

Supervisors: Mr Andrew Maples (telephone 364 2636) and Professor Adrian Sawyer (telephone 364 2617),

ACIS Department, University of Canterbury, Private Bag 4800, Christchurch Fax 364-2727

I consent to the above requirements for this research including the use and storage of information.

Signed .....

Date 26th April 2010.

Mr John George Russell
1439 Clevedon-Kawakawa Bay Road
R.D. 5 Papakura, Auckland 2585

Human Ethics Committee
Tel: +64 3 364 2241, Fax: +64 3 364 2856, Email: human-ethics@canterbury.ac.nz

UNIVERSITY OF CANTERBURY
Te Whare Wānanga o Waitaha
CHRISTCHURCH NEW ZEALAND

Ref: HEC 2010/28

7 April 2010

Alistair Hodson
Department of Accounting & Information Systems
UNIVERSITY OF CANTERBURY

Dear Alistair

The Human Ethics Committee advises that your research proposal "John George Russell and his impact on New Zealand tax jurisprudence: an investigative analysis" has been considered and approved.

Please note that this approval is subject to the incorporation of the amendments you have provided in your email of 1 April 2010.

Best wishes for your project.

Yours sincerely

pp MGrimshaw

Dr Michael Grimshaw
Chair, Human Ethics Committee

Appendix 3: Interview Questions, Kawakawa Bay

Initial ‘Meet and Greet’

27 January 2010 at Kawakawa Bay, Papakura.

Draft questions for Mr Russell:

[Thank you for having me here, explain what I am researching].

[Do you mind if I record our conversation?]

Template and avoidance information

1. Would you [Mr Russell] be able to draw the template for me – take up blank paper.

2. Please explain the steps of the template.

3. Where did the template idea originally come from?

4. Please explain the template from your perspective. You [Mr Russell] maintain to your ‘dying day’ [*The Independent* article] it is not a tax avoidance template.

5. What is the purpose of the template? Specifically its commercial purpose?

6. The Courts have got it wrong – it is not as complicated as they say – they are interpreting the law in a way that is not meant to be interpreted [*The Independent* article at page 2]. How are the Courts interpreting the law incorrectly?

7. Was the template modified over the years? When? How? Why?

8. The tax losses – where did the losses come from?

9. The TRA estimates 3,500 people affected (up to 1,000 smaller businesses) - is that correct? That is a lot of people! (Take up *The Independent* 2005 article). Is this true? If so, where did the people come from?

10. How many companies have been affected by the template? Refer to Trevor Offen article (2001). [Barber J made comments of 500 such companies, elsewhere 1,100 companies affected]. I will attempt to make a full list of entities.

11. The *Challenge* case from 1986 – do you have any comments? Take up this case.

12. How did you meet your clients? Advertisements? Any copies of adverts?

13. Your comments on the latest tax avoidance cases – structured finance litigation, Penny & Hooper etc. Do you keep up to date reading the latest tax cases?

14. Did you go to the Privy Council in London for *O'Neil*?

15. Did the business owners (e.g. the Millers etc) have any idea about the structure of the loss group? Were they a 'party' to the arrangement? Discuss. The law prior to *Peterson* (and *BNZI*) meeting of minds required. Any comments?

16. Inland Revenue's Exposure Draft (2004) on s BG 1. Now out of date due to the *Peterson* case – any comments? [Take up summary of legal principles].

17. The *BASF* principle – CIR's jurisdiction to amend an assessment is lost once a case has been stated to TRA/ Court. Comments?

18. What has happened to the Millers, O'Neil's, McDougall's etc?

Your Personal Background

19. Your [Mr Russell's] life prior to the template.

20. Do you think that you could have been a farmer or an engineer?

21. What field of engineering do you think you may have studied?

22. Securitibank. How did you get started? Any favourite stories?

23. The creditor settlement for Securitibank – most successful in New Zealand history. Comments?

24. Is it correct that Securitibank creditors received back 110% in 1992 – all their money back plus 10% interest?

25. You [Mr Russell] changed New Zealand law – regarding company directors being directors of other companies – and no natural director liable. Law change in 1985. In Companies Act 1993?

26. You were banned from acting as a director – overturned by Privy Council. Are you willing to discuss?

27. Unfit to be the liquidator of Skybus – convoluted network of companies were 'contrived and illegal' – O'Regan J in September 1983 – Please - are you willing to discuss?

28. The Pakuranga accounting days – a lot of employees and the council complaints. Comments?

29. Do you keep in touch with old employees?

30. What motivates you?

31. Life away from tax – playing the organ twice on Sundays at the Presbyterian Church, rural library duty, learning Scottish jigs and entertaining at the local retirement home. [Page 1 - *The Independent* article].

Inland Revenue Issues

32. The IRD Compliance Model – where do you [Mr Russell] think Inland Revenue would place you on the IRD Compliance Model? (Take up the Model).

33. Where do you [Mr Russell] see yourself on the Inland Revenue Compliance Model and why?

34. Why do you think Inland Revenue have a vendetta against you and the tax template?

The Courts / litigation

35. Judges – have you always found them obliging in relation to issues you [Mr Russell] raised –for example the vendetta issue /Barber J?

36. Where to from here? Do you think that you will retire after the latest litigation? Anything else in the litigation pipeline?

37. Discuss the Track A to Track E arguments. Did Inland Revenue just keep coming up with another track to tax? Track F yet to come?

38. What other issues should be discussed – what else should be considered in a thesis on Mr Russell's effect on tax jurisprudence?

39. What approximately is the cost to date defending the Russell template?

40. How much time are you currently spending on defending the template cases? Still about 80% of your time? [*The Independent* 2005 article page 2].

41. Would you be able to estimate how much time the template cases have taken?

42. Barber J decision: 'I have been sitting on these Russell cases for more than 10 years and I have to say that the Commissioner does seem to have some sort of hang-up as far as Mr Russell is concerned and does funny things that are quite unbalanced really.' What funny things and what has been unbalanced in the past? [*The Independent* article 2005 at page 2].

43. Is the crux of your [Mr Russell's] argument that the IRD owe you money?

44. Section 17 information requests – have there been many from Inland Revenue?

45. Have you found Inland Revenue officers polite in their dealings with you?

46. IRD investigation staff? Have they conducted s16 TAA 1994 searches on your premises?

47. How do you see the tax system in terms of what you do for your clients?

48. What is your influence (in wider terms beyond your clients) on New Zealand tax jurisprudence?

49. What is your motivation to keep going with this litigation?

50. Any regrets? I know that he said that he had no regrets in 2005 [take up *The Independent* 2005 article].

Schedule of Questions

Second Interview 29 April 2010

Questions / topics for discussion with John Russell

The Track A to E arguments:

1. I want to get an understanding of the Track assessment changes from Track A to Track E. The Track A to E assessments.

2. What was being taxed under the various Tracks – Track A original company, Track B original shareholders? Track C – administration charge against parent company, track D – some income against Mr Russell (what income at this stage?). Track E – additional assessment against Mr Russell?

3. Who paid what? The IRD wouldn't put everything on hold for too long as far as payments go? Settlements from the Millers and O'Neil's – amount paid and when. Then did the IRD revisit or was this finality for the original shareholders under Track B?

4. Time lines of assessments – Track A for a few months? Then Track B? Track C and D shortly after? Initial Track E contact with you?

5. Did the Millers and O'Neil's settle with Inland Revenue an amount of tax after the Track B assessments? (Refer to Baragwanath J court case - Judicial Review stating that tax payment was not an issue. Did they settle the whole amount that IRD were after? The Commissioner defended the Track B cases for 43 days and they were held as valid. What then happened in relation to Track C and D?

6. Track C was to assess the parent company – was any tax due via these assessments paid to IRD? Did these assessments get reversed later now that Track E is being pursued?

7. Track D was to assess Mr Russell personally for some of the income stream. What was assessed under Track D? Were these assessments reversed or affirmed and then added to under Track E?

8. When did the IRD first raise the Track E argument to tax everything to you? What was their justification for this?

9. Talk about the current tax case later this year in respect of the Track E argument. They are assessing you for some of the Track B income? And consultancy fees?

10. Why did the IRD go from Track to Track? What was their justification for jumping from one to the other? Why didn't they just start with assessing you personally straight away after the Track A route?

11. Who paid what so far in respect of all of the Tracks? Refer to Judicial Review case (Baragwanath J) with the reconstruction against the Millers and O'Neil's.

12. How long did the Privy Council take in Court time in respect of O'Neil & McDougall? A day? Two days?

13. The Privy Council O'Neil & McDougall case. When Mr Judd suggested that the scheme fell outside of s 99 their Lordships called it 'preposterous'. What was it like in Court? Was the comment made in the Court room or only later in the judgment?

14. Why were Track C and D being pursued during the O'Neil & McDougall Privy Council decision being heard in the United Kingdom? Was it a backup plan for the IRD if unsuccessful in the Privy Council?

Procedural Cases:

15. Your procedural successes in order of importance. Discuss.

Success in the Courtroom:

16. Have you been awarded costs often? For example the 226 information's laid for s 17 offences and then dismissed?

Vendetta Issue:

Proof of IRD vendetta:

17. Copies of any material supporting vendetta argument?

18. Copy of a Management Contract?

19. Get a very good copy of the template on good paper (from University Bookshop). Plus have it signed by John. Miller and O'Neil with all detail perhaps.

20. Letters from IRD supporting vendetta?

21. You were involved in *Dandelion* – IRD – a noticeable change with IRD attitude once you were involved. Improper conduct towards you. Discuss – the appointment of a witness that was inexperienced with the case – Mr Clearkin.

22. Has Judge Willy heard many of your cases?

23. Other cases regarding conduct of IRD staff etc.

24. A copy of the Dandelion letters from IRD to Mr Russell regarding him as not being their tax agent.

25. [redacted]

26. How many clients has Mr Russell represented? The non-template clients - How many current clients? (Only disclose if you wish to).

27. Money – how much money would have been made via the consulting? The assessments total $80 million (or $128 million with penalties etc.).

28. What is the breakdown of the penalties that the IRD are ascribing to you? Post 1996 on Track E? Do you have any copies of assessments?

29. Are you still a tax agent within the IRD system?

30. The template income in total? It was suggested that at one stage Mr Russell was worth in excess of $80 million dollars.

Material in records:

31. Copies of material supporting the vendetta.

32. Affidavits from the various court cases – there are lengthy affidavits for the judicial review case heard by Baragwanath J.

33. An Accountant's Journal advertisement seeking to purchase loss companies / seeking profit companies etc. If available.

Miscellaneous:

34. Did you always have the same investigators deal with you? Mr Player, Mr Foy, Ms Latimer? – any interesting stories?

35. Your interaction with the IRD staff? Was it always with the Russell Team? Did they not allow you to communicate to anyone else within Inland Revenue? Only specific people?Were they generally pleasant? The unusual things sometimes - could we expand on this?

36. Securitibank location: Photograph Queens Arcade (behind Dilworth Buildings (2 floors there).

37. Photograph house where Justice Department conducted the raid in Pakuranga

38. Discuss the Receiverships law change due to John Russell.

39. What cases has he won? Procedural?

40. Copies of any documents / letters supporting the vendetta argument.

41. Was *Case M104* and *M109* the first template cases? *Case R25* an early one.

42. Was *Case L85* (1989) temporary transfer of shares the first pre template case?

43. Copy of management contract – Miller and O'Neil etc.

44. GST litigation? FB Duvall? Perhaps have this as a limitation – brief comment only.

45. Your greatest achievement?

46. When will the litigation end?

47. What do you think will be the ultimate outcome with regard to the Inland Revenue and yourself?

48. Most important cases to read – *Case R25, M104* and *M109*, Judicial Review – Baragwanath J, *O'Neil & McDougall* (PC).

49. What would you do if you were my age now? – go into a management accounting role? Continue in tax? Merchant banking? Farming?

50. More on s 27 Bill of Rights Act 1990 and s 6 Tax Administration Act 1994.

51. Address of office on Upper Queen Street after Securitibank?

52. Any thoughts about how the Track E assessments will go for you?

Appendix 4: Selection of Template Related Companies

Selection of Template Related Companies
(Located from www.companies.govt.nz and confirmed by Mr Russell in July 2010)

Avenue Consultants Ltd
Burroughs Transport Ltd
Charity Construction Co Ltd
Commercial Appliance Repairs Ltd
Consolidated Management Ltd
Consultant Applications Ltd
Corpent Consultants Ltd
Coronet Consultants Ltd
Coronet Homes Ltd
Corporate Enterprises Ltd
Corporate Transport Ltd
Douglas & Henwood Ltd
FB Duvall Ltd
Fuel Haul Management Ltd
Fuel Haulers (1990) Ltd
Highman Holdings Ltd
J M Webster Ltd
K J Cummings Ltd
Managed Fashions Ltd
Managed Hotels Ltd
Motor Dealers Ltd
Mountforts Pharmacy Ltd
Murray Mason Electrical Ltd
New Zealand Property Care Ltd
Panmure Consultants Ltd
Paul Finance Ltd
Property Drainage Services Ltd
Ron West Motors Otahuhu Ltd
Roma Properties Ltd
SLIOC Enterprises Ltd
TC Large Ltd
Thoms Brothers Ltd
Trade Enterprises Ltd
Twig Meats Ltd
Waikato Brokers Ltd
Waikato Brokers Management Ltd
Winter Signs Ltd
Wire Supplies Ltd
Zinc & Brass Foundries Ltd

Appendix 5: Redacted Template Documents

Redacted Template Documents – an explanation

In the early 1980s Mr Russell began to acquire profitable companies and businesses through agents which purchased those companies on attractive terms for both purchasers and vendors. The vendors were required to provide 100 per cent vendor financing and they were persuaded to do this by offering special terms which provided for a modest premium on the share price, and by receiving an option to purchase the assets of the business conducted by the company at some later stage if they wished to do so. The purpose of the option was to give the vendors an assurance that they would not lose their livelihood if things did not work out well in the new venture. Should they wish to part company with Mr Russell's group, they could purchase the assets on a fair and reasonable basis at some subsequent time.

The impugned transaction was purportedly a commercial venture designed to earn an assessable income for the parent company and the consultant. At the time of the purchase of the business and subsequent formation of the subsidiary company the parent company provided a restructuring service to the business and the subsidiary and subsequently provided financial services during the period of business association. The parent company was a member of a group of companies that had associated tax losses available to be carried forward. After the shares of the subsidiary company were purchased that subsidiary became a member of the tax loss group.

Document Analysis

Documents **E1 to E5** are an **'Agreement for Sale and Purchase of a Business'** where the original vendor sold the business 'PROFIT BUSINESS' to a JG Russell controlled company, Commercial Management Limited. Commercial Management Limited was acting on behalf of a JG Russell controlled loss company 'LOSS COMPANY'.

Documents **E6 to E7**, and Documents **E8 to E10** are **'Declarations of Trust'** between Commercial Management Limited and the LOSS COMPANY. The Declarations confirmed that Commercial Management Limited was acting on behalf of LOSS COMPANY in respect of the agreements and contracts entered into concerning the PROFIT BUSINESS.

The original vendor advanced the amount of the purchase price to Commercial Management Limited. No money changed hands. In a separate Declaration of Trust, Documents **E11 to E12**, the original vendor declared that Downsview Nominees Limited was to act as the original vendor's Trustee in respect of the advance and repayment.

A **Deed of Mortgage of Business**, Documents **E13 to E16**, was entered into between Commercial Management Limited acting on behalf of LOSS COMPANY LIMITED and Downsview Nominees Limited acting on behalf of the original vendor. The Deed secures an on-demand mortgage over the PROFIT BUSINESS.

A **Repayment Agreement**, Documents **E17 to E18**, was executed between Commercial Management Limited and Downsview Nominees Limited. The terms of repayment required Commercial Management Limited to pay the Mortgagee a sum of not less than 77.5 per cent of any income in cash received from PROFIT BUSINESS. Commercial Management Limited was required to do this within 7 days of the receipt of any income.

The original vendor entered into a **Management Contract**, Documents **E19 to E23**, with Commercial Management Limited and a JG Russell partnership called Commercial Management. The original vendor was employed as Manager of the business. Commercial Management Limited and Commercial Management were appointed with the Manager to administer and manage the PROFIT BUSINESS. Commercial Management and Commercial Management Limited had no input into the day to day operation of the business. The original vendors continued to control and operate the business as if still owned by them. Under Clause 1 of the Management Contract the original vendor was given full and unfettered control of the operation, conduct and management of the business. Under Clause 11 of the Management Contract the Manager would be remunerated for their services. The amount of the payments would be decided between the company and the Manager.

Pursuant to Clause 12 of the Management Contract the profits of the PROFIT BUSINESS were distributed as an administration charge to Commercial Management Limited as nominee for LOSS COMPANY. Commercial Management Limited would be paid an administrative charge equal to the net surplus arising from the business operation of the PROFIT COMPANY after payment of all costs including payment to Commercial Management and the Managers. As LOSS COMPANY had losses to carry forward there was no tax paid on the income received as an administration charge. LOSS COMPANY retained 22.5 per cent of the administration charge as recompense for the PROFIT BUSINESS taking advantage of its losses. The percentage was calculated at half the applicable company tax rate for the particular year. The administration charge less a 22.5 per cent gain for LOSS COMPANY LIMITED was passed back to ORIGINAL VENDOR as part payment of the loan created to purchase the business. Pursuant to Clause 10 of the Management Contract 5 per cent of the administration charge would be paid by the business to Commercial Management for the provision of business consulting services.

In the redacted documents the original vendor acquired 999 ordinary $1.00 shares and her husband acquired 1 ordinary share in a newly incorporated company NEW COMPANY LIMITED. The formation of NEW COMPANY LIMITED was several months after the sale from the original vendor had been made. The shares were acquired by the original vendor and her husband on behalf of Commercial Management Limited who was acting as nominee for LOSS COMPANY LIMITED. The arrangements made by the original vendor and her husband with Commercial Management

Limited are reflected in the **Declarations of Trust E24 to E26** and **E27 to E29**. Commercial Management Limited and LOSS COMPANY LIMITED also entered into a **Declaration of Trust**, Document **E30 to E31**. The Declaration contained the terms under which Commercial Management Limited acted as trustee for LOSS COMPANY LIMITED in respect of the holding of the shares in NEW COMPANY LIMITED.

Although NEW COMPANY LIMITED purportedly acquired the PROFIT BUSINESS from Commercial Management Limited acting on behalf of LOSS COMPANY LIMITED, the mechanics of the arrangement remained the same as before. Commercial Management Limited received a 20/21th share of annual profits of NEW COMPANY LIMITED as an administration charge to the parent company. Commercial Management received a 1/21th share of the profits as consultancy fees. The administration charge less the 22.5 per cent gain was paid back to the original vendor as repayment of the original advance. 22.5 per cent was retained by Commercial Management Limited on behalf of LOSS COMPANY LIMITED for recompense for the utilisation of its losses.

The profit had effectively been utilised for paying administration and consulting charges. By way of example from a practical perspective the administration charge was calculated every six months and was based on the profits derived by NEW COMPANY LIMITED for that six month period. The payments made to the ORIGINAL VENDOR were also made every six months. The draft six monthly trading accounts of the NEW COMPANY were prepared by the original vendor's local accountant. The accounts showed the net profitability of the company. They were later referred to Mr Russell who calculated the administration charge and the consultancy fee for the six months, utilising all the profit from the trading company. Mr Russell would then post to the local accountant a Commercial Management Limited Trust account cheque for 77.5 per cent of the administration charge for the loan repayment to the ORIGINAL VENDOR, invoices for administration charges and consulting fees, and pay-in slips to receive the administration charges payable to Commercial Management Limited and consulting fees payable to Commercial Management. The Commercial Management Trust Account cheque was then banked into the local accountant's trust account. The original vendor would pay an amount equivalent to the consulting fee and the loan repayments and GST on administration charges and consultancy fees out of the companies' bank account, to the local accountant's trust account. The local accountants used the pay-in slips to pay the full administration charge to the Commercial Management Trust Account (for the benefit of LOSS COMPANY) and the full consulting fee to Commercial Management.

The consulting fee was paid for value received from consulting advice provided as and when required, by Mr Russell. No other fee was charged to the subsidiary company apart from the 5 per cent fee. The vendor (in this particular case) had no knowledge of Mr Russell's business and was not aware of any arrangement he had made in respect of taxation matters with the parent company. The vendor never received the income of the subsidiary company. The objector entered into these transactions in order to make a capital gain on the sale of the business and to obtain continuing administrative and financial assistance thereafter.

In essence the template documents were the same for any business entering the Russell template scheme from 1980 through to 1986. These redacted documents are dated 1985 and 1986 being almost the last entities to enter the tax saving scheme.

E 1

AGREEMENT FOR SALE AND PURCHASE OF A BUSINESS

AGREEMENT made this day of 19 BETWEEN

ORIGINAL VENDOR (hereinafter called "the Vendor") of the one part AND COMMERCIAL MANAGEMENT LIMITED a duly incorporated company having its registered office at Auckland acting as nomine (hereinafter called "the Purchaser") of the other part

WHEREBY the Vendor agrees to sell and the Purchaser agrees to purcha all that the business of at present carried on by the Vendor under the name of PROFIT BUSINESS including the asset of the Vendor owned and used in connection therewith for the sum hereinafter set out AND upon and subject to the following terms and conditions which the parties severally agree to observe and perform:

1. THE purchase price for the assets hereby agreed to be sold shall be the sum of $ (subject to adjustments hereinafter provided) allocated as follows:

(a) For Goodwil the sum of $

(b) For all other assets (net) as per Clause 14 hereof the sum of $.

2. THE Purchaser upon the signing of this agreement shall pay to the Vendor or his agent as a deposit and in part payment of the purch price the sum of $.

3. POSSESSION of the said Business and of the stock and other chat hereby sold shall be given and taken on the day of 19 and shall include the benefit arising from the business since 1 April 1985

4. THE Vendor hereby warrants that the turnover exclusive to the business hereby agreed to be sold is not less than that shown in the books of the business at the date hereof.

COMMERCIAL MANAGEMENT LIMITED The Common Seal of

E2

5. THE Vendor warrants that the Vendor has not received nor had any notice of any requisitions or requirements in respect of the said business and premises which have not been disclosed to the Purchaser.

6. THE Vendor shall pay and discharge all debts and liabilities whatsoever incurred or arising in connection with the said business or in respect of any contract dealing or occurrence prior to delivery of possession as aforesaid and shall indemnify the Purchaser from and against all claims proceedings expenses and costs in connection therewith save those provided for in these presents.

7. THE Vendor warrants that all the assets hereby agreed to be sold are the sole and exclusive property of the Vendor and on delivery of possession will pass to the Purchaser free from any charge or encumbrance except as otherwise provided in these presents whatsoever and further that the said plant fittings and fixtures will be in good operational order and condition at the date of possession.

8. THE Purchaser acknowledges that the Purchaser has inspected the assets and records pertaining to the said business and purchases the same solely in reliance upon the Purchaser's own judgement and not upon any representation or warranty made by the Vendor or any agent of the Vendor except as expressed in this agreement. This provision shall not however operate to relieve the Vendor or any agent of the Vendor from liability for any fraudulent misrepresentation.

9. THE Vendor will do execute and perform all such acts deeds matters and things as may reasonably be required to enable the Purchaser to obtain the full benefit and advantage of the said business and assets and in particular any licences contracts or rights possessed by the Vendor in connection with the said business. The Vendor will take all reasonable steps to enable the Purchaser to retain the telephone connection relating to the business.

IF the Purchaser shall make default in payment of the purchase

E3

price or any part thereof or any interest thereon or in the performance or observance of any other stipulations or agreements on the part of the Purchaser herein contained and such default shall be continued for the space of fourteen (14) days the time for such payments and performances fixed by this agreement being strictly of the essence of the contract then and in any such case the Vendor may without prejudice to any other remedies of the Vendor forthwith or at any time hereafter at the option of the Vendor exercise all or any of the following remedie namely:

(a) Enforce specific performance of this agreement including the payment of all moneys payable hereunder in which case the whole of the unpaid purchase money shall be deemed to have become due and payable to the Vendor notwithstanding the due date of payment thereof as aforesaid may not have arrived.

(b) Rescind this agreement in which case all moneys paid by the Purchaser to the Vendor hereunder shall be absolutely forfeited to the Vendor as and for liquidated damages.

(c) Re-enter upon and take possession of the said premises without the necessity of giving any notice or making any formal demand.

(d) Without being under any obligation to tender a transfer of the said lease or any other legal assurance of the said business or any of the assets hereof to re-sell the said lease and business and the assets thereof either by public auction or private contract either all together or in such lots and upon and subject to such terms and conditions as to the payment of the purchase money or otherwise as the Vendor shall think fit and the deficiency (if any) arising on any such resale and on every attempted resale together with all expenses whatsoever attending the same shall be forthwith made good and paid by the Purchaser to the Vendor as liquidated damages and any increase in price on such resale after deduction of expenses shall belong to the

COMMERCIAL MANAGEMENT The Common Seal of LTD

Vendor.

11. EXCEPT as otherwise expressly herein set out no error or misdescription shall annul the sale but compensation if demanded in writing before completion, but not otherwise, shall be made or given as the case may require the amount to be determined in case of differences by arbitration under the law relating thereto in New Zealand.

12. THE agreements obligations and warranties of the parties herein set forth in so far as the same have not been fulfilled at the time of completion of this transaction shall not merge with the giving and taking possession of the said business or on settlement.

13. THE Vendor hereby covenants that all liability of the business to the Inland Revenue Department for PAYE Tax and Accident Compensation Levies has either been discharged or will be provided for in the accounts of the business and that there is no litigation actual or pending of which the Vendor is aware and which has not been disclosed to the Purchaser which might diminish the assets of the business.

14. THE Purchaser agrees to carry on the business and discharge all debts and obligations of the business as they fall due.

15. WORDS herein used and importing a single number or plural number shall include the plural number and singular number respectivel and words importing the masculine gender shall include the female or neuter gender.

16. WHEN the accounts to 31 March 19 are completed the consideration paid under Clause 1 (b) shall be adjusted to the value of all assets other than goodwill and motor car less all liabilities of the business as appears in the Balance Sheet of the business at 31 March 19 .

17. WHEN the Accounts and Balance Sheet of the business made up to 31 March 19 becomes available a settlement statement shall be prepared

FINANCIAL MANAGEMENT Common Law

E5

by the Purchaser showing the calculations of the purchase price in accordance with the provisions of Clause 1 and 16 hereof. Any excess already paid will be forthwith refunded by the Vendor to the Purchaser and in the event that the price so calculated is greater than $ then the amount in deficiency shall be paid by the Purchaser to the Vendor.

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore written

SIGNED by

ORIGINAL VENDOR

in the presence of:

ORIGINAL VENDOR

_____ Witness

_____

_____

The Common Seal of
COMMERCIAL MANAGEMENT LIMITED
was hereto affixed in the presence of:

COMMERCIAL MANAGEMENT LIMITED The Common Seal of

_____

Duly Authorised Signatory

E6

DECLARATION OF TRUST

THIS DEED made the day of 19 BETWEEN COMMERCIAL MANAGEMENT LIMITED a duly incorporated company having its registered office at Auckland (hereinafter called "the Trustee") of the one part AND LOSS COMPANY a duly incorporated company having its registered office at Auckland (hereinafter called "the Beneficiary") of the other part

WHEREAS

A. THE Trustee has acted as nominee for the Beneficiary in the execution of an Agreement for Sale and Purchase of a Business known as PROFIT BUSINESS (hereinafter called "the Business").

B. THE Trustee is the nominal beneficiary under the Sale and Purchase Agreement aforesaid and made with ORIGINAL VENDOR

C. THE parties hereto wish to record the terms on which the Trustees holds the interest in the Business.

NOW THIS DEED WITNESSETH AS FOLLOWS:

1. THAT all the rights accruing to the Trustee in its capacity as Beneficiary under the aforesaid Agreement for Sale and Purchase of a Business shall accrue to the Beneficiary of this Declaration of Trust and shall be held by the Trustee accordingly.

E7

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore mentioned.

The Common Seal of
COMMERCIAL MANAGEMENT LIMITED
was hereto affixed in the presence of:

Duly Authorised Signatory

The Common Seal of
LOSS COMPANY
was hereto affixed in the presence of:

Duly Authorised Signatory

E8

DECLARATION OF TRUST

THIS DEED made the day of 19 BETWEEN COMMERCIAL MANAGEMENT LIMITED a duly incorporated company having its registered office at Auckland (hereinafter called "the Trustee") of t one part AND LOSS COMPANY a duly incorporated company having its registered office at Auckland (hereinafter called "the Beneficiary") the other part

WHEREAS

A. THE Trustee has acted as nominee for the Beneficiary in the execution of agreements dated 19 entitled Agreement for Sale and Purchase of a Business, Declaration of Trust, Mortgage of Business, Repayment Agreement and Management Contract (hereinafter called "the said Agreements") relating to the business affairs of PROFIT BUSINESS (hereinafter called "the Business").

B. THE parties hereto wish to record the terms on which the Trustees entered into the various Agreements as aforesaid.

NOW THIS DEED WITNESSETH AS FOLLOWS:

1. THAT all the rights and obligations of the Trustee under the said Agreements shall accrue to the Beneficiary and the Trustee shall account to the Beneficiary accordingly.

2. THE Trustee will at the request of the Beneficiary attend all meetings of creditors or proprietors of the Business which the Trustee

shall be entitled to attend by virtue of being the purchaser of the Business or by virtue of having executed the agreements as aforesaid and will vote at all such meetings at which the Trustee attends in such manner as the Beneficiary shall have previously directed in writing and in default of and subject to any such direction at the discretion of the Trustee.

3. THE Beneficiary will at all times hereafter indemnify and keep indemnified the Trustee against all liabilities which the Trustee may incur by reason of having executed the said Agreements and will pay all costs and expenses incurred by the Trustee in respect thereof and all costs and expenses incurred by the Trustee in the execution of the trusts of this Deed.

4. IF any payments or other actions shall be demanded of the Trustee in respect of the said Agreements then the Trustee shall as soon as conveniently may be give notice of any such demand to the Beneficiary by letter sent through the post to the last address of the Beneficiary known to the Trustee and if not less than one week before expiration of the time allowed for the making of such payment or performing of such action the Trustee shall receive any direction in writing from the Beneficiary and the Beneficiary shall pay or provide any money or other resources required to be paid or performed to comply with the direction the Trustee shall act on such direction but if no such direction shall be received or the money required or sufficient money to the satisfaction of the Trustee shall not be received before the time aforesaid the Trustee shall act in the discretion of the Trustee in the matter and such action shall be binding on the Beneficiary.

5. IF the Trustee shall pay any money for expenses or other demands in respect of the Business or in respect of the said Agreements such money together with interest thereon at eighteen percent per annum until payment shall be and remain a charge in favour of the Trustee upon

E10

the said Business and any benefit arising in the hands of the Trustee in respect of the said Agreements.

6. THE Trustee shall hold all and any shares or securities so offer to the Trustee in respect of the said Agreements and in respect of the said Business and subscribed for by the Trustee upon the trusts and subject to the powers and provisions hereby declared concerning the said Business and the said Agreements as if the same were an accretion thereto.

7. DURING the continuance of the trust hereby declared the Beneficiary will pay to the Trustee such sum or sums as shall from time to time be agreed upon as remuneration for the services of the Trustee as aforesaid

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore mentioned.

The Common Seal of
COMMERCIAL MANAGEMENT LIMITED
was hereto affixed in the presence of:

Duly Authorised Signatory

The Common Seal of
LOSS COMPANY
was hereto affixed in the presence of:

Duly Authorised Signatory

E 11

DECLARATION OF TRUST

THIS DEED made the day of 19 BETWEEN DOWNSVIEW NOMINEES LIMITED a duly incorporated company having its registered office at Auckland (hereinafter called "the Trustee") of the one part AND ORIGINAL VENDOR (hereinafter called "the Beneficiary") of the other part

WHEREAS

A. THE Beneficiary has made an advance in the name of the Trustee of dollars to Commercial Management Limited (hereinafter called "the advance") to be held in trust by the Trustee in accordance with the provisions hereof.

B. THE Trustee is the beneficiary of a Mortgage of Business dated 19 made between Commercial Management Limited and the Trustee (hereinafter called "the said Mortgage") to be held in trust by the Trustee in accordance with the provisions hereof.

NOW THIS DEED WITNESSETH AS FOLLOWS:

1. THE Trustee hereby declares that it holds the said Advance and said Mortgage and all monies which may be received in respect there for the Beneficiary and agrees to transfer pay and deal with the Advance and the said Mortgage in such manner as the Beneficiary shall from time to time direct.

2. THE Beneficiary will at all times hereafter indemnify and keep indemnified the Trustee its successors estate and effects against liabilities which the Trustee or they may incur by reason of the s Advance and the said Mortgage being held in the name of the Trustees said and in particular will pay any stamp duties and other de which the Trustee or its successors may be or become liable to pay

The Common Seal of

The Common Seal of

E12

respect of the said Advance and the said Mortgage or any assignments thereof.

3. IF the Trustee shall pay any money for stamp duties or other demands in respect of the said Advance or the said Mortgage such money together with interest thereon at eighteen percent per annum until payment shall be and remain a charge in favour of the Trustee upon the said Advance and the said Mortgage.

4. IN the event that any payment is received by the Trustee in respect of the said Advance or the said Mortgage the Trustee shall distribute the amount received to the Beneficiary.

5. DURING the continuance of the Trust hereby declared the Beneficiary will pay to the Trustee such sum or sums as shall from time to time be agreed upon as remuneration for its services as such Trustee as aforesaid

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore mentioned.

The Common Seal of
DOWNSVIEW NOMINEES LIMITED
was hereto affixed in the presence of:

Downsview Nominees Limited The Common Seal of #

Duly Authorised Signatory

SIGNED by

ORIGINAL VENDOR

in the presence of:

ORIGINAL VENDOR

Witness

E13

MORTGAGE OF BUSINESS

THIS DEED made this day of 19 BETWEEN COMMERCIAL MANAGEMENT LIMITED a duly incorporated company having its registered office at Auckland (hereinafter called "the Mortgagor") of the one part AND DOWNSVIEW NOMINEES LIMITED a duly incorporated company having its registered office at Auckland (hereinafter called "the Mortgagee") of the other part

WHEREAS

A. THE Mortgagor has purchased a business operated under the name of PROFIT BUSINESS (hereinafter called "the said Business").

B. THE Mortgagee has agreed to advance to the Mortgagor at the request of the Mortgagor the sum of ($) to be secured by a charge over the said Business.

C. THE Mortgagor has agreed to enter into and execute these present to secure payment to the Mortgagee of all monies for which the Mortgagor may from time to time be liable to the Mortgagee howsoever arising.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS:

1. THAT the Mortgagor will "on demand" (as those words are defined in the Fifth Schedule to the Chattels Transfer Act 1924) duly and punctually pay all monies which may at any time hereafter become due by the Mortgagor to the Mortgagee whether in respect of the said Business or otherwise and the Mortgagor shall not do any act or permit any occasion to arise whereby the said Business may be liable to be wound up or become subject to any action which would reduce the value of the said Business.

2. THAT it shall be lawful but not obligatory upon the Mortgagee to do any action or pay any money necessary or in the opinion of the Mortgagee expedient to protect the title of the Mortgagee or of the Mortgag

E14

to the said Business or to comply with any default of the Mortgagor pursuant to the mortgage and the Mortgagor will repay to the Mortgagee on demand all monies paid and all expenses incurred by the Mortgagee accordingly and until payment thereof the same shall be added to and become part of the principal monies hereby secured.

3. THAT in case default shall be made by the Mortgagor in payment of any monies hereby secured and such default shall continue for the space of twenty one (21) days or in case there shall be any default in the observance or performance of any of the other covenants agreements conditions or obligations on the part of the Mortgagor herein contained or implied or in the event that the Mortgagor should go into liquidation or receivership then and in any such case the Mortgagee shall have full power from time to time to procure the Mortgagee or the nominee of the Mortgagee to be registered as the owner of the said Business or any part thereof and either before or after procuring such registration may sell the said Business or any part thereof either together or separately by public auction or private contract or partly by one and partly by the other of such modes of sale and subject to such conditions as time or mode of payment of the purchase money as the Mortgagee thinks fit with power to the Mortgagee or the nominee of the Mortgagee to buy the said Business or any part thereof at any sale thereof and to resell the sam without being answerable for any loss or diminution in price and with power to execute assurances and do all other acts and things for completing any such sale as it may think proper and no purchaser shall be bound or concerned to see or enquire whether any of the cases mentione in this Clause has happened or as to the necessity or expedience of the stipulations subject to which such sale shall have been made or otherwise as to the propriety or regularity of such sale or be affected by notice (express or constructive) that no case has arisen to warrant the exercise of such powers or any of them and notwithstanding any

E15

impropriety or irregularity whatsoever in such sale the same shall so far as regards the safety and protection of the purchaser or purchasers be deemed to be within the aforesaid power in that behalf and to be valid and effectual accordingly nor shall any purchaser be bound to see to the application of the purchase money AND the Mortgagor doth hereby appoint the Mortgagee the irrevocable attorney for value of the Mortgagor to sign all such documents and to do all such things as are necessary to avail the Mortgagee of the remedies herein set out.

4. THAT so long as any monies remain owing under the security of these presents the Mortgagor will not mortgage sell transfer or otherwise dispose of or encumber the said Business or any part of it except as may be necessary in the normal course of business and provided that the net assets being total assets less total liabilities is not reduced thereby.

5. THAT the liability of the Mortgagor hereunder shall be limited to its estate and interest in the said Business.

6. THAT the expression "Mortgagor" and "Mortgagee" shall when not inconsistent with the context extend to and include the executors and administrators successors and assigns of the Mortgagor and the Mortgagee respectively and the singular shall include the plural and the masculine shall include the feminine and where there are more mortgagors than one all covenants herein contained or implied and to be performed by the Mortgagor shall bind the mortgagors jointly and every two or more of them jointly and each of them severally and it is hereby agreed and declared that in these presents where the context admits references to the singular number shall include the plural and vice versa; any gender shall include all genders; and personal pronouns and other references to persons shall include corporations.

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore mentioned.

E16

The Common Seal of
COMMERCIAL MANAGEMENT LIMITED
was hereto affixed in the presence of:

Duly Authorised Signatory

The Common Seal of
DOWNSVIEW NOMINEES LIMITED
was hereto affixed in the presence of:

Duly Authorised Signatory

E17

REPAYMENT AGREEMENT

THIS DEED made this day of 19 BETWEEN COMMERCIAL MANAGEMENT LIMITED a duly incorporated company having its registered office at Auckland (hereinafter called "the Mortgagor") of the one part AND DOWNSVIEW NOMINEES LIMITED a duly incorporated company with its registered office at Auckland (hereinafter called "the Mortgagee") of the other part

WHEREAS

A. THE Mortgagor and Mortgagee are parties to a Deed of Mortgage of Business dated the day of 19 which secures an advance of ($) made by the Mortgagee to the Mortgagor.

B. THE Mortgage is "on demand" as those words are defined in the fifth schedule of the Chattels Transfer Act 1924.

C. THE parties hereto have agreed that some limitation of the power of the Mortgagee to demand payment is desirable in the interest of the parties so that the Mortgagor may be able to plan its finances in a proper manner.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS:

1. THE Mortgagor covenants that within seven days of the receipt of any income in cash resulting from the ownership of the business as aforesaid the Mortgagor will pay to the Mortgagee a sum of money not less than 77½% of the amount so received in reduction of the aforesaid advance.

2. THE Mortgagee hereby covenants that provided that the Mortgage observes the provisions of Clause 1 hereof it wil not make any demand upon the Mortgagor for repayment of the amount secured as aforesaid for a period of five years from the date hereof PROVIDED that should at any

COMMERCIAL MANAGEMENT LIMITED Common Seal

E18

time a Receiver or Liquidator be appointed to the Mortgagor then the Mortgagee will be free to make demand at any time for the balance secured by the Mortgage of Business as aforesaid notwithstanding that the Mortgagor has observed the provisions of Clause 1 hereof.

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore mentioned.

The Common Seal of
COMMERCIAL MANAGEMENT LIMITED
was hereto affixed in the presence of:

Duly Authorised Signatory

The Common Seal of
DOWNSVIEW NOMINEES LIMITED
was hereto affixed in the presence of:

Duly Authorised Signatory

E19

MANAGEMENT CONTRACT

THIS DEED made the day of 19 BETWEEN COMMERCIAL MANAGEMENT LIMITED a duly incorporated company having its registered office at Auckland (hereinafter called "the Owner") of the first part AND COMMERCIAL MANAGEMENT a partnership having its principal place of business at Auckland (hereinafter called "the Consultant") of the second part AND ORIGINAL VENDOR (hereinafter called "the Manager") of the third part

WHEREAS

A. THE Owner has purchased a business (hereinafter called "the Business") and is desirous that the services of the Consultant and the Manager be retained on a contractual basis to manage and develop the business as aforesaid.

B. THE parties hereto have agreed to conduct the management of the Business upon the terms and subject to the conditions hereinafter se forth.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS:

1. THE Owner hereby appoints and authorises the Manager to manage and control and operate the Business during the currency of these presents and the Manager shall have the full and unfettered control of the operation conduct and management of the Business including the making of such decisions as the Manager shall think fit relative to the policy to be adopted from time to time in respect of the Business.

2. THE Owner hereby appoints the Consultant as Business Consultant to the Business for the terms of these presents and the Consultant s

E20

in particular handle taxation matters relating to the Business and shall also provide such business consulting advice and services as may be required by the Owner in relation to the Business.

3. THE Owner authorises the Manager from time to time in the unfettered discretion of the Manager to engage and/or dismiss any employee and every such employee shall be required to operate the Business under the direction supervision and control of the Manager.

4. THE Owner authorises the Manager as its agent and on its behalf to enter into any contract as shall in the unfettered opinion of the Manager be necessary for the day to day conduct of the Business.

5. THE Manager shall do all such things as may in the unfettered opinion of the Manager be necessary to keep and maintain accurate records of the operations of the Business and shall endeavour to improve and expand the Business in an efficient and effective manner.

6. THE Manager shall during the currency of these presents actively promote the operations of the Business and shall take all reasonable steps to ensure that the activities of the Business are promoted and all costs and expenses incurred by the Manager in connection with such promotional activities shall be borne by the Business.

7. THE Manager shall provide all reasonable executive supervision of the operations of the Business and will in particular ensure that the management and operation of the Business shall be conducted in accordance with the provisions of this agreement.

8. THE Manager shall at the expense of the Business in all things maintain an adequate level of suitably qualified staff in the Business to ensure that the Business is efficiently and profitably conducted that proper books of account are kept and maintained and that regular reports are submitted to the Manager and Consultant and the Owner to indicate the state of affairs of the Business from time to time. In addition to such periodic reports the Manager shall during the currency

The Common Seal of

E21

of these presents submit to the Consultant and the Owner at least once in each six months a trading and profit and loss account and balance sheet in respect of the activities of the Business AND the costs of preparation of such accounts and balance sheet shall be borne by the Business.

9. THE Manager and the Owner hereby agree to take out and keep on foot during the currency of these presents at the expense of the Business including by way of illustration but not by way of limitation fire and earthquake burglary public liability and loss of profits policies.

10. IN consideration of the services of Consultant provided in terms of this agreement it is agreed by all parties that a business consultant fee will be paid to the Consultant such fee to be calculated at the rate of 5% (five percent) of the amount payable to the Owner under Clause 12 hereof such fee to be paid at the same time as payment is made to the Owner as aforesaid.

11. IN consideration of the services of the Manager provided in terms of this agreement it is agreed by all the parties that a contract sum as agreed between the parties hereto shall be paid to the Manager out of funds of the Business in such manner as the Manager shall direct such sum to be paid progressively throughout the year as and when required by the Manager and that such contract sum will be reviewed at the end of each trading year and consideration will be given by the Owner to the payment of a bonus to the Manager at the time when the Annual Accounts of the Business have been prepared and are being considered by the Owner and the Manager.

12. AT the end of each accounting period and in any event not less than once in each six months the net surplus arising from the operation of the Business after payment of all costs including the payments due to the Consultant and the Manager shall be paid to the Owner as an administration charge.

E 22

13. THIS agreement shall expire on 31 March 19 and shall be replaced by a further agreement in similar terms but for a period of at least four years and containing suitable incentives yet to be agreed between the parties and at a level of remuneration no less than provided in this agreement.

14. ALL differences or disputes which may arise between the parties hereto or any of them touching or concerning these presents or any act or thing to be done suffered or omitted in pursuance thereof or touching or concerning the construction of these presents shall be referred to arbitration in accordance with the Arbitration Act 1908 or any amendmen thereto or re-enactment thereof for the time being in force.

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore written

The Common Seal of
COMMERCIAL MANAGEMENT LIMITED
was hereunto affixed in the presence of:

Duly Authorised Signatory

The Owner

For and on behalf of
COMMERCIAL MANAGEMENT

Duly Authorised Signatory

The Consultant

E23

SIGNED by

ORIGINAL VENDOR

in the presence of:

_____

ORIGINAL VENDOR

_____ Witness

_____

_____ Manager

E24

DECLARATION OF TRUST

THIS DEED made the day of 19 BETWEEN ORIGINAL VENDOR (hereinafter called "the Trustee") of the one part AND COMMERCIAL MANAGEMENT LIMITED a duly incorporated company having its registered office at Auckland (hereinafter called "the Beneficiary") of the other part

WHEREAS the Trustee has recently subscribed on behalf of the Beneficiary for nine hundred and ninety nine shares of one dollar (hereinafter called "the said Shares") in the capital of NEW COMPANY LIMITED a duly incorporated company having its registered office at to be held in trust by the Trustee in accordance with the provisions hereof.

NOW THIS DEED WITNESSETH AS FOLLOWS:

1. THE Trustee hereby declares that the said Shares and all dividends and interest accrued or to accrue upon the same are held by the Trustee for the Beneficiary and agrees to transfer pay and deal with the said Shares and the dividends and interest payable in respect of them in such a manner as the Beneficiary shall from time to time direct

2. THE Trustee will at the request of the Beneficiary attend all meetings of shareholders or otherwise which the Trustee shall be entitled to attend by virtue of being the registered proprietor of the said Shares and will vote at all meetings of shareholders or otherwise which as registered proprietor of the said Shares the Trustee may attend in such manner as the Beneficiary shall have previously directed in writing and in default of and subject to any such direction at the discretion of the Trustee and further will if so required by the Beneficiary execute all proxies or other documents which shall be necessary or proper to enable the Beneficiary or the nominee of the Beneficiary to vote at any such meeting in the place of the Trustee

3. THE Beneficiary will at all times hereafter indemnify and keep indemnified the Trustee against all liabilities which the Trustee may incur by reason of such shares being so registered in the name of the Trustee as aforesaid and in particular will pay all calls and other demands which the Trustee may be or become liable to pay in respect of the said Shares or in respect of any shares or securities for which pursuant to any conditional or preferential right offered to the Trustee in respect of the said Shares or any of them the Trustee may in the discretion of the Trustee subject as hereinafter mentioned think fit to subscribe and all costs and expenses incurred by the Trustee in the execution of the trusts of this Deed.

4. IF any conditional or preferential right to subscribe for any shares or securities in any company or any other option shall be offered to the Trustee as holder of the said Shares or otherwise in respect thereof or any call be made upon any of the said Shares or other payment demanded in respect thereof the Trustee shall as soon as conveniently may be give notice of such offer or call or demand to the Beneficiary by letter sent through the post to the last address of the Beneficiary known to the Trustee and if not less than one week before expiration of the time allowed for the exercise of such option or making such payment the Trustee shall receive any direction in writing from the Beneficiary and the Beneficiary shall pay or provide any money required to be paid to comply with such direction the Trustee shall act on such direction but if no such direction shall be received or the money required or sufficient money to the satisfaction of the Trustee shall not be receiv before the time aforesaid the Trustee shall act in the discretion of the Trustee in the matter and such action shall be binding on the Beneficiary

5. IF the Trustee shall pay any money for calls or other demands in respect of the said Shares or in respect of any shares or securities so offered to and subscribed for by the Trustee as aforesaid such money

together with interest thereon at eighteen percent per annum until payment shall be and remain a charge in favour of the Trustee upon the said Shares.

6. THE Trustee shall hold all and any shares or securities so offered to the Trustee in respect of the said Shares and subscribed for by the Trustee upon the trusts and subject to the powers and provision hereby declared concerning the said Shares as if the same were an accretion thereto.

7. DURING the continuance of the Trust hereby declared the Beneficiary will pay to the Trustee such sum or sums as shall from time to time be agreed upon as remuneration for the services of the Trustee as aforesaid

8. THE Beneficiary shall have power from time to time to remove the Trustee and to appoint a new trustee in the place of any trustee removed.

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore mentioned.

The Common Seal of
COMMERCIAL MANAGEMENT LIMITED
was hereto affixed in the presence of:

Duly Authorised Signatory

SIGNED by

ORIGINAL VENDOR
in the presence of:

ORIGINAL VENDOR

Witness

E27

DECLARATION OF TRUST

THIS DEED made the day of 19 BETWEEN ORIGINAL VENDOR'S HUSBAND (hereinafter called "the Trustee") of the one part AND COMMERCIAL MANAGEMENT LIMITED a duly incorporated company having its registered office at Auckland (hereinafter called "the Beneficiary") of the other part

WHEREAS the Trustee has recently acquired one ordinary share of one dollar fully paid (hereinafter called "the said Shares") in the capital of NEW COMPANY LIMITED a duly incorporated company having its registered office at to be held in trust by the Trustee in accordance with the provisions hereof.

NOW THIS DEED WITNESSETH AS FOLLOWS:

1: THE Trustee hereby declares that the said Shares and all dividends and interest accrued or to accrue upon the same are held by the Trust for the Beneficiary and agrees to transfer pay and deal with the said Shares and the dividends and interest payable in respect of them in such a manner as the Beneficiary shall from time to time direct.

2. THE Trustee will at the request of the Beneficiary attend all meetings of Shareholders or otherwise which the Trustee shall be entitled to attend by virtue of being the registered proprietor of the said Shares and will vote at all meetings of shareholders or otherwise which as registered proprietor of the said Shares the Trustee may attend in such manner as the Beneficiary shall have previously directed in writing and in default of and subject to any such direction at the discretion of the Trustee and further will if so required by the Beneficiary execute all proxies or other documents which shall be necessary or proper to enable the Beneficiary or the nominee of the Beneficiary to vote at any such meeting in the place of the Trustee.

E28

3. THE Beneficiary will at all times hereafter indemnify and keep indemnified the Trustee against all liabilities which the Trustee may incur by reason of such shares being so registered in the name of the Trustee as aforesaid and in particular will pay all calls and other demands which the Trustee may be or become liable to pay in respect of the said Shares or in respect of any shares or securities for which pursuant to any conditional or preferential right offered to the Trustee in respect of the said Shares or any of them the Trustee may in the discretion of the Trustee subject as hereinafter mentioned think fit to subscribe and all costs and expenses incurred by the Trustee in the execution of the trusts of this Deed.

4. IF any conditional or preferential right to subscribe for any shares or securities in any company or any other option shall be offered to the Trustee as holder of the said Shares or otherwise in respect thereof or any call be made upon any of the said Shares or other payment demanded in respect thereof the Trustee shall as soon as conveniently may be give notice of such offer or call or demand to the Beneficiary by letter sent through the post to the last address of the Beneficiary known to the Trustee and if not less than one week before expiration of the time allowed for the exercise of such option or making such payment the Trustee shall receive any direction in writing from the Beneficiary and the Beneficiary shall pay or provide any money required to be paid to comply with such direction the Trustee shall act on such direction but if no such direction shall be received or the money required or sufficient money to the satisfaction of the Trustee shall not be received before the time aforesaid the Trustee shall act in the discretion of the Trustee in the matter and such action shall be binding on the Beneficiary.

5. IF the Trustee shall pay any money for calls or other demands in respect of the said Shares or in respect of any shares or securities so offered to and subscribed for by the Trustee as aforesaid such money

E29

together with interest thereon at eighteen percent per annum until payment shall be and remain a charge in favour of the Trustee upon the said Shares.

6. THE Trustee shall hold all and any shares or securities so offered to the Trustee in respect of the said Shares and subscribed for by the Trustee upon the trusts and subject to the powers and provisions hereby declared concerning the said Shares as if the same were an accretion thereto.

7. DURING the continuance of the Trust hereby declared the Beneficiary will pay to the Trustee such sum or sums as shall from time to time be agreed upon as remuneration for the services of the Trustee as aforesaid

8. THE Beneficiary shall have power from time to time to remove the Trustee and to appoint a new trustee in the place of any trustee remove

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore mentioned.

The Common Seal of
COMMERCIAL MANAGEMENT LIMITED
was hereto affixed in the presence of:

_____
Duly Authorised Signatory

COMMERCIAL MANAGEMENT LIMITED
The Common Seal of

SIGNED by

ORIGINAL VENDOR'S HUSBAND

in the presence of:

_____
ORIGINAL VENDOR'S HUSBAND

_____ Witness

_____

_____

E30

DECLARATION OF TRUST

THIS DEED made the day of 19 BETWEEN COMMERCIAL MANAGEMENT LIMITED a duly incorporated company having its registered office at Auckland (hereinafter called "the Trustee") of the one part

AND

LOSS COMPANY a duly incorporated company having its registered office at Auckland (hereinafter called "the Beneficiary") of the other part

NEW ZEALAND STAMP DUTY $_._-
22/10/[illegible] DUTY $10.0

WHEREAS

A. THE Trustee has acted as nominee for the Beneficiary in the purchase of one thousand (1,000) ordinary shares of one dollar each (hereinafter called "the said Shares") in the capital of NEW COMPANY LIMITED a duly incorporated company having its registered office at

.

B. THE Trustee is the nominal Beneficiary under certain Declarations of Trust in respect of the said Shares and made with ORIGINAL VENDOR and ORIGINAL VENDOR'S HUSBAND

C. THE parties hereto wish to record the terms on which the Trustee holds the said Shares.

NOW THIS DEED WITNESSETH AS FOLLOWS:

1. THAT all the rights accruing to the Trustee in its capacity as Beneficiary under the aforesaid Declarations of Trust shall accrue to the Beneficiary of this Declaration of Trust and shall be held by the Trustee accordingly.

E31

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore mentioned.

The Common Seal of
COMMERCIAL MANAGEMENT LIMITED
was hereto affixed in the presence of:

Duly Authorised Signatory

The Common Seal of
LOSS COMPANY
was hereto affixed in the presence of:

Duly Authorised Signatory

Appendix 6: Letter demonstrating typical Administration and Management fees

COMMERCIAL MANAGEMENT

Business Consultants

Telephone 567-505
Telex NZ 2838 BUSERV

6 Downsview Road,
Auckland, 6

15 June 1987

Ans'd.....

RECEIVED
18 JUN 1987

Limited

Dear Mr

Thank you for your letter dated 27th May 1987 enclosing a copy of the draft accounts for the six months ended 30 September 1986.

The surplus shown in the draft accounts is dealt with in accordance with the Management Contract in the following manner:

Commercial Management fee	$ 835
Administration fee	$16,694
	$17,529

We enclose deposit slips to accept these payments and also our trust account cheque in the amount of $12,938 which is a reduction in the advance made to the parent company.

Provided your trust account is funded in the amount of $4,591 you will have sufficient monies to complete the transaction.

We enclose the two pages of the draft accounts showing our adjustments.

Would you please advise the date that settlement is effected and let us have a copy of the typed accounts in due course.

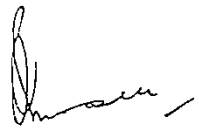
2/...

Settled. 25/6/87

Re: Limited

I believe that the Inland Revenue Department will accept the first year depreciation as the plant has now been purchased by the company as a separate tax paying entity.

Yours faithfully,



J.G. Russell

Appendix 7: Miller and O'Neil, Managed Fashions Ltd Reconstruction

Miller & O'Neil, Managed Hotels Ltd and Managed Fashions Ltd reconstruction
Income years 1986 to 1989

Year	*Managed Hotels Ltd (Either alone or as agent)*	*Managed Fashions Ltd*	*Brent L Miller*	*Patricia A Miller*	*Brian A O'Neill*	*Moira O'Neill*
1986	$	$	$	$	$	$
Income as returned	To be advised	Nil	33,420.16	30,397.43	30,395.17	33,497.71
Adjustments						
Administration fees disallowed in terms of s 99 and/or s 104	(1,454,946.00)	1,454,946.00				
Consultancy fees disallowed in terms of s 104		72,747.00				
Less:						
Deemed income of:						
Brent L Miller		(363,736.50)	363,736.50			
Patricia A Miller		(363,736.00)		363,736.00		
Brian A O'Neill		(363,736.50)			363,736.50	
Moira O'Neill		(363,736.50)				363,736.50
In terms of s 99(3)						
Income ascertained	Yet to be finalised	72,747.50	397,156.66	394,133.43	394,131.67	397,234.21

Year	*Managed Hotels Ltd (Either alone or as agent)*	*Managed Fashions Ltd*	*Brent L Miller*	*Patricia A Miller*	*Brian A O'Neill*	*Moira O'Neill*
1987	$	$	$	$	$	$
Income as returned	To be advised	Nil	50,203.89	50,213.65	48,070.46	50,975.01
Adjustments						
Administration fees disallowed in terms of s 99 and/or s 104	(1,442,068.00)	1,442,068.00				
Consultancy fees disallowed in terms of s 104		78,104.00				
Less:						
Deemed income of:						
Brent L Miller		(360,517.00)	360,517.00			
Patricia A Miller		(360,517.00)		360,517.00		
Brian A O'Neill		(360,517.00)			360,517.00	
Moira O'Neill		(360,517.00)				360,517.00
In terms of s 99(3)						
Income ascertained	Yet to be finalised	78,104.00	410,720.89	410,730.65	408,587.46	411,492.01

Miller & O'Neil, Managed Hotels Ltd and Managed Fashions Ltd reconstruction
Income years 1986 to 1989

Year	*Managed Hotels Ltd (Either alone or as agent)*	*Managed Fashions Ltd*	*Brent L Miller*	*Patricia A Miller*	*Brian A O'Neill*	*Moira O'Neill*
1988	$	$	$	$	$	$
Income as returned	To be advised	Nil	53,527.61	54,135.26	39,103.06	37,479.39
Adjustments						
Administration fees disallowed in terms of s 99 and/or s 104	(812,025.00)	812,025.00				
Consultancy fees disallowed in terms of s 104		40,601.00				
Less:						
Deemed income of:						
Brent L Miller		(203,006.25)	203,006.25			
Patricia A Miller		(203,006.25)		203,006.25		
Brian A O'Neill		(203,006.25)			203,006.25	
Moira O'Neill		(203,006.25)				203,006.25
In terms of s 99(3)						
Income ascertained	Yet to be finalised	40,601.00	256,533.86	257,141.51	242,109.31	240,485.64

Year	*Managed Hotels Ltd (Either alone or as agent)*	*Managed Fashions Ltd*	*Brent L Miller*	*Patricia A Miller*	*Brian A O'Neill*	*Moira O'Neill*
1989	$	$	$	$	$	$
Income as returned	To be advised	Nil	74,209.11	74,196.69	30,475.00	31,337.76
Adjustments						
Administration fees disallowed in terms of s 99 and/or s 104	(670,208.00)	670,208.00				
Consultancy fees disallowed in terms of s 104		33,510.00				
Less:						
Deemed income of:						
Brent L Miller		(167,552.00)	167,552.00			
Patricia A Miller		(167,552.00)		167,552.00		
Brian A O'Neill		(167,552.00)			167,552.00	
Moira O'Neill		(167,552.00)				167,552.00
In terms of s 99(3)						
Income ascertained	Yet to be finalised	33,510.00	241,761.11	241,748.69	198,027.00	198,889.76

Appendix 8: Understanding the 'Mechanics' of 'Track E'

Understanding the 'Mechanics' of 'Track E'

Commercial Management Ltd sold Russell template arrangements as part of its business. In December 1982 this business was taken over by a partnership formed by Mr Russell, with partners comprising Commercial Management Ltd and Business Properties Ltd, (another company controlled by Mr Russell). The partnership traded successfully and at times employed up to 59 staff.

Much of Commercial Management Ltd's income was derived from the sale of the Russell template arrangements. Further income was generated from the payment (every six months) of consulting fees both by the trading company and the parent company involved in a template transaction. The Commissioner alleged that, in the income years 1978 to 1984 inclusive, Commercial Management Ltd was involved in tax avoidance that benefited Mr Russell. For various reasons the Commissioner proposed no adjustment for that period.[973]

In May 1984, Commercial Management Ltd sold its business to a new partnership, the Commercial Management Partnership.[974] The Commercial Management Partnership conducted the business which continued to earn substantial income from fees and other earnings received principally from the sale and use of the Russell template arrangements. There was a significant increase in this income from 1981.

The partnership business was managed by Commercial Management Ltd and it was appointed as agent by the partnership for the purpose of entering into contracts on behalf of the business.[975] When Mr Russell incorporated Commercial Management Ltd in 1977, at the same time he incorporated Corporate Securities Ltd. Mr Russell controlled both entities and pursuant to a business consultancy agreement, Commercial Management Ltd was managed by Corporate Securities Ltd. Corporate Securities Ltd had no staff.

The net effect of this structure was that Mr Russell controlled the Commercial Management Partnership through the consulting arrangements between Commercial Management Ltd and Corporate Securities Ltd and between Corporate Securities Ltd and himself personally. Mr Russell not only controlled the Commercial Management Partnership but also both Commercial

---

973 *Russell v Commissioner of Inland Revenue* [2012] NZCA 128, (2012) 25 NZTC 20,120 (CA) at [16].

974 The partners were Marketing Agencies Ltd and Business Properties Ltd.

975 It seems there were similar management and control arrangements between the two partners and Commercial Management Ltd. Marketing Agencies Ltd appointed Commercial Management Ltd to manage and control it. Wylie J was unable to make firm findings on this point with respect to Business Properties Ltd due to an absence of documentation: *Russell v Commissioner of Inland Revenue* (2010) 24 NZTC 24,463 (HC) at [20].

Management Ltd and Corporate Securities Ltd and all of the associated entities via the complex ownership structure.[976]

The next step involved the introduction by Mr Russell of companies with accumulated tax losses. The loss companies were also controlled by Mr Russell. Agency and management agreements and declarations of trust were entered into by both the partners with a loss company.[977] The legal effect was that the loss companies became the beneficial owners of the income that came to the partners. Given that the loss companies had accumulated tax losses, they were able to offset the tax losses against the income of the partners. The result was that no tax was paid on any income earned by the partners.

This methodology could only last as long as the loss companies had available accumulated losses to offset against the respective partner's income. The available losses first ran out in the 1987 tax year. Only part of the income for that year could be assigned to the original loss companies. Mr Russell established new agency and management agreements and new declarations of trust between both partners and new loss companies. Each of these companies took an assignment of the remaining portion of the respective partner's income which was offset against the accumulated losses of the replacement loss company.[978] As time moved on, the losses were used up. New loss companies needed to be introduced again in the 1992 tax year.

Mr Russell also controlled finance companies including Money Market Securities Ltd.[979] Where the partners advanced funds (which they did on a regular, if not daily basis) to a finance company such as Money Market Securities Ltd, no interest was paid to the partners. The partners were able to, and did, draw down money from Money Market Securities Ltd when they required funds. The partners did not pay interest on the monies received.

The income of the Commercial Management Partnership comprised of two sources. Firstly approximately 90 per cent of the income of the partnership came from Russell template sources, namely the consulting fees of 5 per cent and other fees paid from the 22.5 per cent administration charges to the Russell template trading companies. The remaining 10 per cent comprised income from other sources including consulting fees and professional income generated by Mr Russell.

---

[976] All of the various agreements between the parties were signed by Mr Russell either personally or as director or duly authorised signatory on behalf of these entities.

[977] Mr Russell acquired control following liquidation or receivership of the loss company. Mr Russell appointed himself receiver and in that capacity signed the agency and management agreements with the parties.

[978] Assignment of income to the replacement loss companies continued from 1987 until the 1990 tax year. Two further replacement loss companies were then introduced.

[979] The shareholders in Money Market Securities Ltd were Commercial Management Ltd and Business Properties Ltd. It provided funds for the extensive corporate group controlled by Mr Russell. Other finance companies also controlled by Mr Russell were used as a repository of the net income generated by the Commercial Management Partnership.

The total net profit for the Commercial Management Partnership over the 1985 to 1995 period was $13,611,973. Over the same period the net advances to the finance companies by the partners amounted to $13,725,315.[980] From the net profit of the Commercial Management Partnership in any given tax year, 50 per cent was allocated to the partners at the relevant time. By virtue of the agency and management agreements, and declarations of trust, the loss companies linked to the partners then became the beneficial "owners" of the income.[981]

As surplus funds became available from the income (minus any expenses incurred by the Commercial Management Partnership), they were forwarded from the Commercial Management Partnership to either Money Market Securities Ltd or one of the other finance companies controlled by Mr Russell.[982] The funds were for the credit of the relevant partners of the Commercial Management Partnership and the partners were able to draw down on their accounts with Money Market Securities Ltd whenever they required funds. Cash surpluses were sent from the Commercial Management Partnership to Money Market Securities Ltd almost on a daily basis. This was treated as net profit of the Commercial Management Partnership "advanced" to the partners by way of circular transactions.[983]

Throughout the period 1985 to 2000 Mr Russell allocated to himself a modest income for the provision of consulting services to Corporate Securities Ltd. The amounts of income treated as salary varied from a low of $14,015.70 in the 1988 year, to a high of $29,015.70 returned in the 1987 year. This is contained in the summary table 'Summary of income attributed to the disputant'. The following table also shows the income attributed to Mr Russell from the 1985 to 2000 income years.

[980] These figures were both stated in *Case Z19* (2009) 24 NZTC 14,217 (NZTRA) at [257] and [258].

[981] The amounts allocated to the partners in each tax year and the assignments to the loss companies are described in *Russell v Commissioner of Inland Revenue* (2010) 24 NZTC 24,463 (HC) per Wylie J at [25] to [58].

[982] Charity Finance Ltd was one of the other finance companies. Its shareholders were Charity Construction Ltd and Downsview Nominees Ltd.

[983] By way of example, see *Russell v Commissioner of Inland Revenue* (2010) 24 NZTC 24,463 (HC) at [28] where Wylie J refers to a transaction on 3 January 1986 whereby Money Market Securities Ltd advanced $290,000 to the Commercial Management Partnership. On the same day, the partnership paid $141,978.93 to each of the partners, and they in turn advanced the money back to Money Market Securities Ltd.

Summary of income attributed to the disputant

Tax Year	Income as returned or assessed	Reversal of 1996 reassessment adjustments	Income as originally returned by the disputant	Income Ascertained	Discrepancy
1985	270,882.03	(253,275.15)	17,606.88	301,564.75	283,957.87
1986	670,429.00	(648,098.55)	22,330.45	730,259.28	707,928.83
1987	1,516,927.81	(1,487,912.11)	29,015.70	822,985.70	793,970.00
1988	753,070.62	(739,054.92)	14,015.70	947,481.70	933,466.00
1989	416,644.39	(391,644.39)	25,000.00	712,948.00	687,948.00
1990	1,293,473.92	(1,278,473.92)	15,000.00	1,597,481.00	1,582,481.00
1991	1,600,767.35	(1,585,740.14)	15,027.21	1,923,735.21	1,908,708.00
1992	1,415,242.54	(1,398,007.04)	17,235.50	1,992,010.20	1,974,774.70
1993	826,548.11	(811,548.11)	15,000.00	1,542,178.54	1,527,178.54
1994	819,817.16	(804,817.16)	15,000.00	1,760,129.82	1,745,129.82
1995	429,051.32	(414,051.32)	15,000.00	1,330,607.21	1,315,607.21
1996	20,047.76	0.00	20,047.76	1,342,214.19	1,322,166.43
1997	20,358.20	0.00	20,358.20	559,635.70	539,277.59
1998	20,179.10	0.00	20,179.10	150,601.43	130,422.33
1999	18,149.25	0.00	18,149.25	(18,935.42)	(37,084.67)
2000	19,735.01	0.00	19,735.01	62,658.78	42,923.77
Total	10,111,323.57	(9,812,622.81)	298,700.76	15,757,556.18	15,458,855.42

In January 1989 Mr Russell settled the Russell Family Trust with the primary beneficiaries being Mr Russell's children and grandchildren.[984] Mr Russell at times received nominal remuneration from the Russell Family Trust. In August 1996, Mr Russell settled the Kawakawa Trust; again the primary beneficiaries were members of Mr and Mrs Russell's family.

During the 1994 tax year Charity Finance Ltd, a Russell controlled finance company, advanced $197,844.46 to Kawakawa Bay Properties Ltd to enable it to purchase a property at 1439 Clevedon-Kawakawa Bay Road, which became Mr Russell's residence since shifting from 6 Downsview Road, Pakuranga.

The trusts also purchased property for Mr Russell's children. In 1997 an amount of $20,000 was withdrawn by the Russell Family Trust from Charity Finance Ltd. The balance in the Russell Family Trust's account with Charity Finance Ltd of $1,190,391 was transferred to another Russell controlled finance company, Downsview Finance Ltd. The Russell Family Trust then withdrew four payments each totalling $128,083.52 from Downsview Finance Ltd. A further payment of $30,000 was noted as being the payment of a deposit on a house being purchased by Michelle Lowndes. A

[984] John and Melva Russell were not beneficiaries of the Russell Family Trust. In their capacity as trustees they entered into a loan agreement as borrowers with Mr Russell being the lender. Mr Russell advanced unspecified sums of money to the Russell Family Trust, such advances being made for a period of 20 years and not bearing any interest. Following establishment of the Trust there were examples of funds being advanced from the current account of Mr Russell with Money Market Securities Ltd to the Trust. Having received the advance, the Trust in turn put the funds on term investment with Money Market Securities Ltd. By way of example in September 1989 and November 1989 respectively, sums of $250,000 were advanced from Mr Russell's current account with Money Market Securities Ltd to the Russell Family Trust.

further $30,000 was paid in relation to the purchase of a property at 3-165 Great South Road, Drury by a Mr and Mrs Henry. Mrs Henry is one of Mr Russell's daughters.

Appendix 9: Summary of 'Track E' Loss Entities and Partnerships

Truncated Summary of Track 'E' loss entities/partnerships	
1972	Mr Russell a chartered accountant. From 1972 to 1977 was managing director of Securitibank. Mr Russell carried out some accountancy and advisory work on his own account while employed at Securitibank.
1977	On 1 April 1977 **Commercial Management Ltd** and **Corporate Securities Ltd** were incorporated. Mr Russell held 9,999 shares in **Commercial Management Ltd**, the other share was held by **Money Market Securities Ltd**, another company he controlled. Mr Russell was director and company secretary of **Commercial Management Ltd**. Mrs Russell was also a director. Mr Russell was director and company secretary of **Corporate Securities Ltd**. Mr Russell held 9,999 shares, the other share was held by **Downsview Nominees Ltd**, another company controlled by Mr Russell.
1980	**Commercial Management Ltd** began to sell what became known as 'Russell template' arrangements as part of its business.
1982	December 1982 - Partnership formed – between **Commercial Management Ltd** and **Business Properties Ltd**. The shareholders and directors of **Business Properties Ltd** were **Commercial Management Ltd** and **Money Market Securities Ltd**. At the time a company could be a director of another company. The Partnership took over the business of **Commercial Management Ltd**. Employed up to 55 staff at various times. The officers of **Corporate Securities Ltd** were **Commercial Management Partners** and **Commercial Management Associates**. Mr Russell was a partner in both partnerships and both were Russell controlled entities.

1984	May 1984 **Commercial Management Ltd** sold its business to a new partnership known as **Commercial Management Partnership**. The partnership business was managed by **Commercial Management Ltd** and it was appointed agent for the partnership for the purpose of entering into contracts. In July 1984 partnership took over existing management contracts of **Commercial Management Ltd.** **Commercial Management Partnership** partners were **Marketing Agencies Ltd** and **Business Properties Ltd**. **Marketing Agencies Ltd's** shareholders were **Commercial Management Ltd** and **Downsview Nominees Ltd**. **Marketing Agencies Ltd's** directors were **Commercial Management Partners** and **Commercial Management Associates**. In October 1984 **Marketing Agencies Ltd** appointed **Commercial Management Ltd** to manage and control it. It seems that there was a similar arrangement involving **Business Properties Ltd**, although no documents have been produced to confirm this.
1985	The first two loss companies were **Glamour Accessories NZ Ltd** and **Valencia Licensed Restaurant 1974 Ltd**. Mr Russell appointed as receiver of both companies. Agency and management agreements and declarations of trust entered into. In April 1985 **Commercial Management Ltd** appointed **Charity Construction Ltd** to manage it. **Charity Construction Ltd** was majority owned by **Corporate Securities Ltd**. Not all contractual arrangements were carried into effect – unclear whether the agreement with **Charity Construction Ltd** was implemented. Monies received by **Business Properties Ltd** and **Marketing Agencies Ltd** forwarded on a daily basis to **Money Market Securities Ltd**, a finance company. **Money Market Securities Ltd** was controlled by Mr Russell. Its shareholders were **Commercial Management Ltd** and **Business Properties Ltd**, and its officers were **Commercial Management Partners** and **Commercial Management Associates**.
1987	New loss companies introduced – **Quality Knitwear NZ Ltd** and **J & P Harding Ltd**
1988	Agency and management agreements with the first loss companies, **Glamour Accessories NZ Ltd** and **Valencia Licensed Restaurant 1974 Ltd** not relied upon to assign income. Letters sent terminating the agreements. Agreements with **Quality Knitwear NZ Ltd** and **J & P Harding Ltd** remain in force.

1989	**Russell Family Trust** established.
1990	New loss company introduced – **Billy-Joe's Nite Spot Ltd**. Judgment entered against **Downsview Nominees Ltd** and Mr Russell personally in the sum of $638,709.33.
1991	New loss company introduced – **Davill Shoes Ltd** On 1 July 1991 **Marketing Agencies Ltd** retired from Partnership. Replaced by **Downsview Debt Collections Ltd**. The shareholders were Mr and Mrs Russell. The shares are held for the **Russell Family Trust**. **Commercial Management Partners** and **Commercial Management Associates** were the company officers. On 2 July 1991 **Business Properties Ltd** retired from the Partnership. Replaced by **Personal Loans Ltd**. The shareholders were Mr and Mrs Russell holding the shares for the **Russell Family Trust**. Mr Russell and **Commercial Management Associates** were the officers of the company.
1992	New loss companies introduced – **Plim Builder Ltd**. **Downsview Debt Collections Ltd** entered into agency and management agreement and declaration of trust with **Plim Builder Ltd**. **Personal Loans Ltd** entered into an agency and management agreement and a declaration of trust with a company known as **Paul Finance Ltd**.
1994	**The Commercial Management Partnership** comprising **Downsview Debt Collections Ltd** and **Personal Loans Ltd** continued. 1439 Clevedon-Kawakawa Bay Road purchased by **Kawakawa Bay Properties Ltd**. Mr Russell was a director of **Kawakawa Bay Properties Ltd**. Its share capital comprised 1,000 shares held by **Equity Capital Investments Ltd**. The shares in **Equity Capital Investments Ltd** were in turn owned by **Commercial Administration Ltd**. **Glen Eden Holdings Ltd** held the shares in **Commercial Administration Ltd** in trust for the **Russell Family Trust**. **Commercial Management Ltd** owned all of the shares in **Glen Eden Holdings Ltd**. Mr Russell was a director of **Commercial Management Ltd**, and at the time **Commercial Administration Ltd** held all the shares in **Commercial Management Ltd.**

	Second partnership formed by Mr Russell on 6 April 1994. Partners were **Hamlin Facilities Ltd** and **The Tag Gun Company Ltd.** At the time the shareholders in **Hamlin Facilities Ltd** were **Commercial Administration Ltd** and **Glen Eden Ltd.** Mr Russell and **Commercial Management Associates** were the controlling officers. **The Tag Gun Company Ltd** had the same shareholders and officers. **Commercial Administration Ltd** was a Russell controlled company. Mr Russell was a director of the company and the shares were held by **Glen Eden Holdings Ltd** on trust for the **Russell Family Trust**. **Commercial Management Ltd** held all of the shares in **Glen Eden Holdings Ltd**. The partnership agreement recorded that **Hamlin Facilities Ltd** and **The Tag Gun Company Ltd** were to purchase the consulting business conducted at 6 Downsview Road under the name of **Commercial Management**. There does not appear to have been an agreement for sale and purchase of the business, and Mr Russell advised the Commissioner in correspondence that **Downsview Debt Collections Ltd** and **Personal Loans Ltd** continued trading in partnership under the trade name **Commercial Management.**
1995	Orders made by Taxation Review Authority to disclose documents. Documents were not disclosed by Mr Russell. The Commissioner did not have information as to which particular loss companies the profit was allocated to. The Commissioner proceeded on the basis that the same process of assignment of the income to loss companies occurred. This was not disputed. The first partnership, **Downsview Debt Collections Ltd** and **Personal Loans Ltd** received consulting income (and depreciation recovered). The second partnership, **Hamlin Facilities Ltd** and **The Tag Gun Company Ltd** also received consulting fees.
1996	**Kawakawa Trust** formed. Trustees of the trust were Mr Russell and a company called **Trustman Services Ltd**. Mr Russell was the settlor and the primary beneficiaries were members of Mr and Mrs Russell's family. Loan agreement entered into between Mr and Mrs Russell as trustees for the **Russell Family Trust** and Mr Russell and **Trustman Services Ltd** as trustees, recording an agreement in relation to future advances between the **Russell Family Trust** and **Kawakawa Trust**. Both partnerships (**Downsview Debt Collections Ltd** and **Personal Loans Ltd**, and **Hamlin Facilities Ltd** and **The Tag Gun Company Ltd**) received income. The Commissioner assumed that the arrangements continued with net profits attributed to loss entities and cash surpluses forwarded to finance companies. This was not disputed. Mr Russell received nominal remuneration from the **Russell Family Trust**.

1997	$20,000 was withdrawn by the **Russell Family Trust** from **Charity Finance Ltd**. The balance in the **Russell Family Trust's** account with **Charity Finance Ltd** of $1,190,391 was transferred to another Russell controlled company – **Downsview Finance Ltd**. The **Russell Family Trust** withdrew four payments each totalling $128,083.52 from **Downsview Finance Ltd**. A further payment of $30,000 was noted as being the payment of a deposit on a house being purchased by Michelle Lowndes, Mr and Mrs Russell's daughter. Further $30,000 paid in relation to the purchase of a property at 3-165 Great South Road, Drury by Mr and Mrs Henry. Mrs Henry is also a daughter of Mr and Mrs Russell. **Russell Family Trust** also transfer $73,096.11 to a branch of ANZ Bank in Queensland to an account in the name of **Downsview Nominees Ltd**. Further change in the partnership entities. The partners in the second partnership (**Hamlin Facilities Ltd** and **The Tag Gun Company Ltd**) sold the **Commercial Management Partnership** business owned by them to **Mahalo Ltd**. The purchase price was $10,000. The shareholders in **Mahalo Ltd** were **Commercial Management Ltd** and **Downsview Nominees Ltd**. The officers were Mr Russell and **Commercial Management Associates**.
1998	**Mahalo Ltd** returned consulting income of $32,141, financial services income of $51,000 and interest of $588. Claimed expenses and returned a net loss of $44,532. Mr Russell received a nominal income from the **Russell Family Trust** of $20,179.10. Mr Russell withdrew $100,000 from **Downsview Finance Ltd**. He advanced this money to the **Russell Family Trust**. First partnership (**Downsview Debt Collections Ltd** and **Personal Loans Ltd**) made a net profit of $28,498.65 which was apportioned between the partners as to 50 per cent each. The second partnership (**Hamlin Facilities Ltd** and **The Tag Gun Company Ltd**) continued to trade. It had a net profit of $56,822.58 which was apportioned between the partners as to 50 per cent each. The **Russell Family Trust** withdraws $541,085.75 from **Downsview Finance Ltd.** $195,000 paid to the **Kawakawa Trust**. **Kawakawa Trust** purchases a property in Meola Road. **Russell Family Trust** also pays $389,085.75 into **Downsview Nominees Ltd's** account with ANZ Bank in Queensland. Four payments totalling $444,320.92 from **Downsview Nominees Ltd** account with ANZ Bank in Queensland to an account with the Bank Of Queensland. The account was in the name of Mr and Mrs Russell as trustees of the **Russell Family Trust**. An amount of AUD $300,000 transferred from the **Russell Family Trust** account with the Bank of Queensland to a second account with the Bank of Queensland in the name of Mr Russell and **Trustman Services Ltd** as trustees of the **Kawakawa Trust**.

1999	Mr Russell officially 'retired' in 1999. Mr Russell's nominal income was $18,149.25 from the **Russell Family Trust**. The **Russell Family Trust** withdrew $100,000 from **Downsview Finance Ltd**. **Commercial Management Partnership** arrangement continued. **Mahalo Ltd** received consulting income of $79,312, financial services income of $5,868 and $342 by way of interest income. It claimed expenses and returned a net loss of $38,508. The first partnership (**Downsview Debt Collection Ltd** and **Personal Loans Ltd**) did not trade during the year. The second partnership (**Hamlin Facilities Ltd** and **The Tag Gun Company Ltd**) received a net profit of $1,428.28 apportioned equally between the partners.
2000	Mr Russell receives New Zealand superannuation Mr Russell received a nominal income of $19,735.01. Mr Russell's' self-employed income returned was $10,000. The **Kawakawa Trust** withdrew $20,000 from **Downsview Finance Ltd**. **Mahalo Ltd** returned consulting income of $154,737, financial services income of $5,065, and interest income of $572. It claimed expenses, and returned a net profit of $42,426. The net profit was offset against its carry forward losses. The first partnership (**Downsview Debt Collection Ltd** and **Personal Loans Ltd**) did not trade. Second partnership (**Hamlin Facilities Ltd** and **The Tag Gun Company Ltd**) received a net profit of $464.18, which was apportioned equally between the partners.

Appendix 10: Mr Russell, Statement of Account, Income Tax, August 2012

022390*

Inland Revenue
Te Tari Taake

Statement of account

INCOME TAX

IR 949
March 2011

MANUKAU CITY
0800 377 774

R RUSSELL
Commissioner of Inland Revenue

MR
JOHN GEORGE RUSSELL
1439 CLEVEDON-KAWAKAWA BAY RD
RD 5 PAPAKURA AUCKLAND 2110

IRD number

Date issued 17 AUG 2012
Any payments made after this date will be on your next *Statement of account*.

Statement number 114 PAGE 001
Previous statement 13 JUL 2012

Date	Details	Debt $	Credit $	Balance $
	INCOME TAX 1985			
	PERIOD NOT YET FINALISED			
	INCOME TAX 1986			
	PERIOD NOT YET FINALISED			
	INCOME TAX 1987			
	BALANCE LAST STATEMENT			7,656,670.68
	INCOME TAX 1988			
	BALANCE LAST STATEMENT			5,489,329.46
	(Continued on next page)			

- Please ignore this request if you have already paid.
- Please pay any overdue amount immediately.
- If you can't pay please call the phone number above.

Due date	Details	Amount $
OVERDUE	INCOME TAX	200,182,178.18

PLEASE DISREGARD THIS REQUEST FOR PAYMENT IF THE ACCOUNT HAS BEEN PAID.

- **Use the payment slip below when paying. Tear off here ▼ Keep this top part for your records.**

Inland Revenue
Te Tari Taake

Payment slip

IRD number

MR
JOHN GEORGE RUSSELL

Post your payment in the Inland Revenue envelope provided to: P O BOX 1535 HAMILTON

INCOME TAX

Payment due IMMEDIATELY $200,182,178.18

If the payment you're making is different from the payment due write the details here.

Year/period	Tax type	Amount $
Total payment made ▶		$

1821781811 0111411 900111 0011: 025807804111

02291*

Inland Revenue
Te Tari Taake

Statement of account
INCOME TAX

For enquiries, please contact:

Inland Revenue
Private Bag MANUKAU CITY
Telephone 0800 377 774

R RUSSELL
Commissioner of Inland Revenue

MR
JOHN GEORGE RUSSELL
1439 CLEVEDON-KAWAKAWA BAY RD
RD 5 PAPAKURA AUCKLAND 2110

IRD number

Date issued 17 AUG 2012
Any payments made after this date will be on your next Statement of Account.
Statement Number 114 PAGE 002
Previous Statement 13 JUL 2012

IR 944A April 2008

Date	Details	Debit $	Credit $	Balance $
	INCOME TAX 1989			
	BALANCE LAST STATEMENT			19,397,489.61
08AUG12	Additional Tax	1,939,748.96		21,337,238.57
	INCOME TAX 1990			
	BALANCE LAST STATEMENT			29,807,725.04
08AUG12	Additional Tax	2,980,772.50		32,788,497.54
	INCOME TAX 1991			
	BALANCE LAST STATEMENT			37,417,060.89
08AUG12	Additional Tax	3,741,706.08		41,158,766.97
	INCOME TAX 1992			
	BALANCE LAST STATEMENT			29,450,503.88
08AUG12	Additional Tax	2,945,050.38		32,395,554.26
	INCOME TAX 1993			
	BALANCE LAST STATEMENT			18,318,531.22
08AUG12	Additional Tax	1,831,853.12		20,150,384.34
	INCOME TAX 1994			
	BALANCE LAST STATEMENT			16,989,882.66
08AUG12	Additional Tax	1,698,988.26		18,688,870.92
	INCOME TAX 1995			
	BALANCE LAST STATEMENT			8,763,203.21
08AUG12	Additional Tax	871,436.54		9,634,639.75
	INCOME TAX 1996			
	BALANCE LAST STATEMENT			7,097,438.63
08AUG12	Additional Tax	702,000.16		7,799,438.79
	INCOME TAX 1997			
	BALANCE LAST STATEMENT			2,285,195.46
08AUG12	Additional Tax	225,440.40		2,510,635.86
	INCOME TAX 1998			
	BALANCE LAST STATEMENT			437,273.10
05AUG12	Incremental Late Payment Penalty	2,513.08		439,786.18
16AUG12	Use of Money Interest - Reversal		185,964.46	253,821.72
17AUG12	Interest	188,017.78		441,839.50

Daily interest of $59.03 accrues on this balance from the statement date.

02292*

Inland Revenue
Te Tari Taake

Statement of account
INCOME TAX

For enquiries, please contact:

Inland Revenue
Private Bag MANUKAU CITY
Telephone 0800 377 774

R RUSSELL
Commissioner of Inland Revenue

MR
JOHN GEORGE RUSSELL
1439 CLEVEDON-KAWAKAWA BAY RD
RD 5 PAPAKURA AUCKLAND 2110

IRD number

Date issued 17 AUG 2012
Any payments made after this date will be on your next Statement of Account.

Statement Number 114 PAGE 003
Previous Statement 13 JUL 2012

Date	Details	Debit $	Credit $	Balance $
	INCOME TAX 2000			
	BALANCE LAST STATEMENT			128,927.49
05AUG12	Incremental Late Payment Penalty	765.32		129,692.81
16AUG12	Use of Money Interest - Reversal		52,394.56	77,298.25
17AUG12	Interest	53,013.29		130,311.54
	Daily interest of $17.78 accrues on this balance from the statement date.			
	**********			
	INCOME TAX 2012			
	PREVIOUS BALANCE			.00
01APR12	Transfer from 1985		979.30	979.30CR
01APR12	Transfer to Rebate Claim	979.30		.00

IR 944A April 2008

Appendix 13: Table of Selected Cases in Chronological Order

Table of Selected Cases in Chronological Order	
Date/ Case/Judge	**Issue**
08/08/1984 *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 (HC); (1984) 6 NZTC 61,807; (1984) 8 TRNZ 1. Barker J	High Court agreed with the taxpayer that s 99 cannot apply in circumstances where comprehensive provisions in the statute itself cover the particular topic tax losses and grouping, and where the taxpayer complies with such provisions, (which include anti-avoidance provisions).
20/10/1986 *Commissioner of Inland Revenue v Challenge Corporation Ltd* [1987] AC 155 (PC); [1986] 2 NZLR 513 (PC); (1986) 8 NZTC 5,219 (PC). Lord Keith of Kinkel, Lord Brightman, Lord Templeman, Lord Oliver of Aylmerton, Lord Goff of Chieveley	Majority judgment for the CIR. Section 191 was intended to give effect to the reality of group profits and losses and in those circumstances was not an instrument of tax avoidance. In *Challenge* the reality was the taxpayer had never made a loss. The loss was made by Perth and had fallen on Merbank before the taxpayer had contracted to buy Perth. Section 191 ITA 1976 in these circumstances was an instrument of tax avoidance and had fallen foul of s 99 ITA 1976.
28/03/1988 *Case K28* (1988) 10 NZTC 257 (NZTRA). Judge Bathgate, TRA Legal representative for the CIR was Mr M Ruffin.	Purchase of tax loss shell company. Contemporaneous purchase by shell company of property development company. Shell becoming parent company and charging administration fee to subsidiary property development company. The subsidiary property development company claimed a deduction under s 104 ITA 1976 (now s DA 1 ITA 2007). Issue was whether the purpose of the arrangement was tax avoidance and whether the subsidiary had incurred expenditure in gaining assessable income. The taxpayers were concerned with a 4 March 1980 law change in regard to tax losses. Case distinguished from *Challenge* – consideration was paid for the transfers, issue was the legitimacy of the deduction.

Case L85 (1989) 11 NZTC 1,485 (NZTRA).	Temporary share transfer to manipulate shareholding requirements.
23/08/1990 *Case M104* (1990) 12 NZTC 2,660 (NZTRA).	First 'Track A' case (*K. J. Cummings Ltd*). Judge Barber agrees with Mr Grierson that the transaction was "commercially ingenious" but rejected the submission that it was "commercially realistic". *Challenge* case considered. This is not a case of tax mitigation; it is a clear case of avoidance in terms of s 99. False date of arrangements alleged.
04/09/1990 *Case M109* (1990) 12 NZTC 2,690 (NZTRA). Judge Barber	'Track A' (*Ron West Motors (Otahuhu) Ltd*). This was the second template case heard in the TRA, (Cases *M104* and *M109* were heard at the same time). No nexus between administration charges and income earning capacity of taxpayer.
13/06/94 *Paul Finance Ltd v Commissioner of Inland Revenue* (1994) 16 NZTC 11,257 (HC). Master Anne Gambrill	Computer generated cheque dishonoured, Mr Russell argued he was the only person authorised to commit the company, not his staff. Contractual Mistakes Act 1977 and Bills of Exchange Act 1908 referred to.
13/07/1994 *Case R25* (1994) 16 NZTC 6,120 (NZTRA). Judge Barber	Consultancy services provided to the objector company from the Commercial Management Partnership (Mr Russell) were both normal commercial advice and advice as to the tax avoidance scheme. TRA found that advice totalled 15 hours per month. The TRA's conclusion was that the part of the consultancy fee which represented half of that, i.e. 7.5 hours per month at a reasonable hourly rate for Mr Russell's services (at $250 an hour) was deductible. While the figures differ, similar findings have been made in other template cases. Hence, rather than the company having to pay tax on the quantum of the 5% consulting fee, a deduction has been allowed by the TRA for the hours spent on the non-tax avoidance advice at $250 per hour.

6/10/1995 *Paul Finance Ltd v Commissioner of Inland Revenue* [1995] 3 NZLR 521 (CA); (1995) 17 NZTC 12,379 (CA). Richardson J, Henry J, Thomas J	Computer generated cheque issued to Paul Finance Ltd. Cheque dishonoured.
8 /11/1996 *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,001 (HC). Interim judgement of Baragwanath J	Plaintiffs advanced the argument that s 191 ITA 1976 (in the amended form enacted in 1980 following the *Challenge* decision) to advance an argument that had failed in the Privy Council, that s 191 provided a code distinct from s 99. Plaintiffs emphasised in particular new subsection (7C) which gave the Commissioner a limited anti-avoidance power in the context of grouping accounts.
23/01/1997 *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13, 127 (HC). Baragwanath J	Second judgment on application for judicial review.

29/05/1997 *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13, 219 (HC). Judgment of Baragwanath J on Limitation and on Appeal Mr BM Grierson for Applicants and Appellants FB Bolwell for Commissioner on judicial review Mr MJ Ruffin and CK Wood for Commissioner on appeal	CPS not complied with, tax avoidance, administration charge deductibility, consulting charge deductibility, the 1980 amendment reverses the effect of *Challenge*; whether s 191(7C) provides a complete code and recourse to s 99 is excluded, CIR 'following the money', statute bar and discovery issues.
29/09/1998 *Miller v Commissioner of Inland Revenue* (Alt cit *Managed Fashions Ltd v Commissioner of Inland Revenue*) [1999] 1 NZLR 275 (CA); (1998) 18 NZTC 13, 961 (CA). Gault J, Henry J, Thomas J, Blanchard J, Tipping J Mr BM Grierson counsel for taxpayer Mr MJ Ruffin counsel for CIR	Judgment provides a summary of the history of the litigation to date, the CIR's CPS on s 99 discussed; Track C. Part 2 was a judicial review considering 'going where the money is'; failure to follow the CPS; tentative or provisional assessments; concurrent Track A and Track B; additional tax; time bar; vendetta; failure to comply with natural justice; unfair discrimination; arbitrary or capricious conduct of the CIR; and issues of privilege.

04/05/1999 Judge AAP Willy *Commissioner of Inland Revenue v Dandelion Investments Ltd* [2000] 2 NZLR 548 (CA); (2000) 19 NZTC 15, 585 (CA) Mr Willox for CIR Mr JG Russell for objector company	Discussion regarding s 99 CPS, comment from Committee of Tax Experts recommending to immediately withdraw the CPS due to it being unsatisfactory and inadequate. Improper purpose or motive mentioned, statute bar and sham. Assessment vitiated, allegations of lack of impartiality, and unnecessary obstruction of the objector by the Commissioner to be proved. The 'feuding must stop'.
14/07/1999 *Case U16* (1999) 19 NZTC 9,168 (NZTRA). Special Audit case Decision of Judge PF Barber JG Russell, Financial Consultant for Objector CK Wood and RJ Willox, Counsel for Respondent	Deductibility of expenses, Special Audit case. 1991 entertainment expenses of $2,000 – it eventually became clear that the $2,000 was not spent on food for a staff Christmas function but on massage parlour services for buyers at the objector's car auctions. Judge Barber states: "Presumably, only a small number of buyers received that perceived benefit from sex industry workers at the particular massage parlour. Unless the services needed to be somehow provided as an inducement to purchase at car auction, one wonders about deductibility; but the item has been conceded and the link between the service and the objector's income earning process did not need to be explained to me." Taxpayer's records were quite inadequate and in rather a mess well before Mr Russell became involved. Mr Russell did his best to reconstruct matters, but naturally in a manner favourable to the taxpayer. Mr Russell "appears to be no friend of the respondent." Judge Barber comments "I record that Mr Russell made extensive submissions along the lines of improper purposes and motives of officers of the respondent and alleged a general vendetta of the respondent's department towards him and his clients. I noted, in the course of the hearing, that I felt that the attitude of the respondent's department to Mr Russell 'lacks maturity and need polishing'. I have often felt that officers of the IRD are quite unhelpful to Mr Russell – sometimes hostile to him and sometimes flippant. Such attitudes do not assist resolution of tax disputes whether between the department and Mr Russell or his many clients. I appreciate Mr Russell's interpretation of revenue laws, particularly, in terms of tax avoidance, and his general strategies and the extent of his tax advisory business, are thorns in the side of the department and relate to enormous unpaid taxes overall; but treating him as an enemy of the State does not expedite resolution".

17/05/000 *FB Duvall Ltd v Commissioner of Inland Revenue* (2000) 19 NZTC 15, 658 (CA). Richardson P, Gault J, Keith J BM Grierson for Appellant JHC Coleman and MJ Ruffin for Respondent	GST objection proceeding that has had a tortured history. Appeal allowed. CIR will recognise input tax credits and make appropriate refunds without further notice. Duvall entitled to costs on the appeal fixed at $5,000.
17/08/2000 *Paul Finance Ltd v Commissioner of Inland Revenue* (2000) 19 NZTC 15,863 (HC). Reserved judgment of Glazebrook J	Claim for exemplary damages, defendants' actions malicious, defendant acted to inflict economic injury on the plaintiff.
10/04/2001 *O'Neil v Commissioner of Inland Revenue* (Alt cit: *Miller v Commissioner of Inland Revenue*) [2001] UKPC 17; [2001] 3 NZLR 316 (PC); (2001) 20 NZTC 17,051. Lord Nicholls of Birkenhead, Lord Steyn, Lord Hoffman, Lord Millett, Dame Sian Elias	An appeal by the taxpayers against the Court of Appeal's dismissal of application for judicial review. Distinction between tax mitigation and tax avoidance unhelpful. Limits of judicial review considered, s 99(4) with regard to reopening under the time bar, the effect of non-compliance with the s 99 CPS, an allegation that assessments were clearly wrong on the face, so must be irrational and therefore void was met with the response that "Their Lordships consider that this submission can only be called preposterous". Track A to Track B change an abuse of process raised, s 99(4) inconsistent assessments raised, as well as whether assessments were tentative.

20/08/2002 *Russell v Taxation Review Authority* (2002) 20 NZTC 17, 832 (HC). O'Regan J	All references to the Commissioner acting "fraudulently and dishonestly" replaced by references to the Commissioner acting "in breach of an obligation to act honestly and fairly". Section 27(1) Bill of Rights Act 1990 and s 6 TAA 1994 raised.
20/08/2003 *Miller v Commissioner of Inland Revenue* (2003) 21 NZTC 18,243 (HC). Baragwanath J	Costs judgment relating to Miller and O'Neil. Mentions that Mr and Mrs Miller had paid full amounts undertaken to pay. Mr and Mrs O'Neil paid 42% then emigrated leaving the balance unpaid. *Kemp* litigation and *Auckland Gas* referred to.
27/08/2003 *Russell v Commissioner of Inland Revenue* (2003) 21 NZTC 18, 272 (HC). Gault P, Blanchard J and Anderson J GJ Judd QC for appellant AC Beck for Respondent	Section 27(1) Bill of Rights Act 1990 section 6 TAA 1994 and Scally principle. Appeal dismissed.
29/08/2003 *Commissioner of Inland Revenue v Ron West Motors (Otahuhu) Ltd* (2003) 21 NZTC 18,281 (HC). Master Faire	Companies Act 1993 case. Tracks discussed briefly, s 99(3) and (4) referred to.

16/01/2004 *Case W37* (2004) 21 NZTC 11,360 (NZTRA). (hearing on an on-going basis since February 1999) Ruling of Judge PF Barber on legal professional privilege for minutes of certain meetings Mr MJ Ruffin counsel for CIR Mr GJ Judd QC and Mr JG Russell	Various names of 'monthly meetings' identified. Legal privilege and litigation privilege examined in detail, including fraud exception. Minutes were held to be privileged from discovery. Section 6 TAA 1994 and Bill of Rights Act 1990 referred to. Alleged vendetta raised, Judge Barber allowing 10 days for a hearing on this issue before him.
08/03/2005 *Commissioner of Inland Revenue v FB Duvall Ltd* HC Auckland CIV 2004-404-4460, 8 March 2005. Reserved Judgment of Priestley J A Beck for Appellant GJ Judd QC for Respondent	Under s 26 of the Taxation Review Authorities Act 1994. Priestley J states at [5] 'In my view this is a totally unsatisfactory state of affairs in respect of taxation obligations which are 10 to 15 years old. It puzzles me such a state of affairs can co-exist with "the integrity of the tax system", enshrined as policy in s 6 TAA 1994. It is not the Authority's statutory function to exercise the Commissioner's s 33(2) discretion. Nor is it a function of the Authority to usurp the Commissioner's statutory responsibility to exercise that discretion in an appropriate but reviewable way by weighing the various factors stipulated by the Court of Appeal in *CIR v Wilson* (supra). Fundamental jurisdictional matters cannot be sidestepped by the Authority claiming "curative" powers or functions?' In respect of costs, Priestley J stated at [64] 'Although the applicant has been successful I am profoundly uneasy about the way in which the central issue of the proper assessment for the respondent's GST liability between 1 March 1990 and 31 December 1994 has been handled. Although costs are predictable, the Court nonetheless retains some overriding discretion which must be informed by considerations of fairness and justice.' At [65] stating 'Given that the Commissioner initially invoked the procedure stating a case to the Taxation Review Authority, and also given that the threshold discretion of the Commissioner conferred by s33(2) was triggered in March 1998, but some 7 years later has yet to be exercised, I might require some persuasion to award costs in the appellant's favour. At counsel's suggestion costs are reserved.'

15/03/2005 *CIR v Russell* (2005) 22 NZTC 19,664 (DC). Oral judgment of Judge PF Barber Mr MJ Ruffin for CIR (Informant) Mr GJ Judd QC and Mr S Judd for Mr JG Russell	Originally 226 prosecutions for breach of s 17 of the Inland Revenue Act 1974. Many were withdrawn, ultimately 106 informations. Mr Russell challenged the validity of the informations. Section 5(1) Interpretation Act 1999 referred to. Procedural win for Mr Russell. The proceedings were a nullity and could not be overcome. An appropriate delegation needed to sign the informations. Mrs Denise Latimer did not fit into that situation. At all material times, Mrs Latimer's actual work did not fit her departmental title; she also did not fit the slightly complicated but sophisticated system of delegations.
27/07/2005 *Case Z3* (2009) 24 NZTC 14,027 (NZTRA). Ruling of Judge Barber GJ Judd QC for disputant Mr MJ Ruffin for CIR	This case was seeking to disqualify Judge Barber from the 'Track E' litigation. It was respectfully submitted that was inevitable to bring prior views (from the template cases) into this proceeding involving Mr Russell personally. One comment referred to was from *Case R25* where Judge Barber stated 'It seems to me that a prime JGR strategy is to use due process for the purposes of delay and confusion'. Judge Barber stated at [12] 'I believe that every nuance of my findings in *Case R25* has been consistently upheld in appellate Courts (including that I was not obliged to allow 40 or 50 more hearing days), so that I would be bound to those findings'. Judge Barber also stated 'I do not think I have any particular predetermined views about the present case which, quite frankly, I do not yet quite understand at this early stage'. Vendetta issue discussed. Judge Barber stated at [63] 'These template cases have been dealt with by me in a specialist jurisdiction and, as he is entitled to, Mr [Russell] ensures that all that I do and state is scrutinised by appellate Courts. This is the key reason for such cases having taken so many years to date'. Application to recuse was dismissed.

01/09/2005 *Wire Supplies Ltd v Taxation Review Authority* (2005) 22 NZTC 19,395 (HC). Courtney J GJ Judd QC / J McCartney for taxpayers M Ruffin for the Commissioner	Unsuccessful application by Wire Supplies Ltd and Waikato Brokers Ltd for judicial review quashing TRA decision. The judicial review sought on ground that TRA failed to hear evidence of IRD officer Mr McDermott before delivering final decisions. CIR used various modes of assessment regarding the Russell template companies. Mr McDermott was the architect of modes of assessment known as Tracks C and D, and assessments at issue before TRA were Track A and B assessments.
07/04/2006 *FB Duvall Ltd v Commissioner of Inland Revenue* (2006) 22 NZTC 19,866 (CA). William Young P, Glazebrook and Robertson JJ GJ Judd QC for Appellant AC Beck and R Wallace for Crown	Appeal from decision of Priestley J of 8 March 2005. Bill of Rights Act 1990, s 6 TAA 1994 and estoppel issues raised. Appeal dismissed.
13/07/2006 *Downsview Nominees Ltd v Registrar of Companies* (2006) 22 NZTC 19,971 (HC). Judgment of Ellen France J RJ Warburton for plaintiff MJ Ruffin and A Wortman for Commissioner of Inland Revenue	Application to restore companies to the Register of Companies. Companies Act 1955 and Companies Act 1993. In weighing the balance overall, the merits of restoration were not particularly strong. Just and/or equitable to allow the majority of the companies to pursue the litigation and resolve it.

11/06/2007 *Case Y8* (2007) 23 NZTC 13,076 (NZTRA). Further Rulings of Judge PF Barber Mr GJ Judd QC for disputant Mr MJ Ruffin for CIR	A case considering discovery. The *Kemp* litigation referred to. 'Track E' case. Good discussion regarding legal privilege and the members of the Russell Team. Mr Russell's counsel submitted that a member of the Russell Team who was a solicitor could not be a legal advisor to the Russell Team of the IRD. It was submitted that a person cannot be both solicitor and the solicitor's client at the same time. Dispensed with, entitled to legal privilege when they are acting as lawyers. Tax assessments put forward as being 'intellectually offensive'.
15/06/2007 *Wire Supplies Ltd v Commissioner of Inland Revenue* [2007] NZCA 244; [2007] 3 NZLR 458; (2007) 23 NZTC 21,404. Glazebrook J, O'Regan & Ellen France JJ	Excellent summary of 'Tracks'. Three appeals CA 206/05, CA 207/05, CA 208/05.
11/10/2007 *Commissioner of Inland Revenue v Panmure Consultants Ltd* (2008) 23 NZTC 21,665 (HC). (Oral) Judgment of Associate Judge Faire [on application to liquidate company] C Wood for plaintiff (Meredith Connell) No appearance for defendant	Mr Russell sought to represent Panmure Consultants Ltd in the High Court arguing inter alia that the CIR was acting in disregard of s 6 TAA 1994 and the Bill of Rights Act 1990, that the CIR was committing a fraud in refusing to give effect to s 99(4) ITA 1976 arguing the same income was assessed to him personally in 1996 and 2003. A company has no right of audience in the Superior Courts (re Mannix [1984] 1 NZLR 309). It must appear by a person who is admitted as a barrister or solicitor of the High Court under the Law Practitioners Act 1982. The Court does have a residual discretion reserved for use primarily in emergency situations where the assistance of counsel is not needed by the Court, or where it might be unduly technical or burdensome to insist on counsel. No proper basis for exercise of the discretion. Panmure Consultants Ltd was unable to be represented by Mr Russell.

26/11/2007 *Case Y20* (2008) 23 NZTC 13,207 (NZTRA). Interim decision of Judge PF Barber	Submission that Inland Revenue consistently put forward the wrong witness in breach of s 6 TAA 1994 and Bill of Rights Act 1990. No obligation based on the rules of natural justice requiring a litigant in a civil proceeding, whether or not a public authority, to identify and make available witnesses considered by the opposing litigant to be the 'correct ones'. On record in this case that Mr Russell and his various counsel have been given massive latitude by Judge Barber in the conduct of these hearings. The suggestion made by the objectors that, in the template cases, they have not received a full and fair hearing of their ground of objection is, in Judge Barber's view preposterous. Regarding Mr Russell's conduct in the hearings, Mr Russell has 'almost created a filibuster situation by prolonging cross-examination in the hope that some favourable item might materialise for objectors.' Judge Barber noted that Mr Russell 'is a very experienced, most intelligent, and able advocate and, clearly, has many strategies; and it was up to him to use wisely the very reasonable time provided to him in the conduct of this litigation.'
13/11/2008 *Commissioner of Inland Revenue v FB Duvall Ltd* (2009) 24 NZTC 23, 135 (HC). Judgment of Associate Judge Doogue Mr Wood for Plaintiff Mr SRG Judd for Defendant	Companies Act 1993. Statutory demand served. Defendant opposed liquidation order on two grounds – bank cheque made out to Ministry of Justice for full amount of $30,076.23. Issue of solvency. The need to establish solvency is not discharged by showing that the defendant can pay one of its creditors. Discretion not to appoint liquidators. Adjourned until 5 December 2008.

19/12/2008 *Russell v Taxation Review Authority* (2009) 24 NZTC 23,284 (HC). Cooper J Mr Russell appeared in person	Mr Russell's own case – 'Track E'. Tax debt at this stage was around $100 million. Mr Russell was seeking to have his case determined by a different Taxation Review Authority than the Authority that had embarked on the task, Judge Barber. An application was made to Judge Barber to recuse himself, and when that application was declined Mr Russell commenced this application for review under the Judicature Amendment Act 1972. The claim was based on bias and alleged that because Judge Barber had consistently held against Mr Russell over the many years in which the arrangements designed by Mr Russell have been the subject of litigation before the Authority, there must be a reasonable apprehension that the Judge will not bring an impartial mind to the resolution of the case. Judge Barber was the only appointed Taxation Review Authority. Bill of Rights Act 1990 (s 27) and s 6 TAA 1994 in Cause of Action. Bias at common law, *Muir* and Flamm book referred to.
16/02/2009 *Douglas v Commissioner of Inland Revenue* (2009) NZTC 23, 331 (HC). Reserved Judgment of Courtney J GJ Judd QC for Applicant CK Wood for Respondent	Final decision in relation to assessments. Amended assessments confirmed, SLIOC assessable income reduced for each relevant year by $22,500 to reflect consultancy fee. Amended assessments to be issued if several companies are restored to Companies Register.
17/09/2009 *Case Z19* (2009) 24 NZTC 14,217 (NZTRA). Reserved decision Judge Barber	Heard in Auckland over 64 days between 3 October 2005 and 30 April 2009. Mr Russell appearing on his own behalf. The essential issue was the correctness of assessments against the disputant for the years 1985 to 2000 inclusive exceeding $80 million dollars taking into account penalties and interest. Track E.

25/02/2010 *FB Duvall Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,053 (HC). Judgment of Allan J SRG Judd for plaintiffs M Ruffin and RJ Wallace for defendant	Under the Judicature Amendment Act 1972. Duvall (along with some 21 other plaintiffs claiming a similar interest) initially pleaded four causes of action, including that the CIR had acted unlawfully, unfairly and unreasonably in refusing to amend assessments for both income tax and GST. Case discusses procedural history of the FB Duvall litigation. First cause of action survives with respect to Duvall only but will require significant re-pleading (tenable argument for review) of the Commissioner's decision not to accept (as distinct from allow) its late objections. Second and third causes of action are struck out, fourth cause of action stayed by consent. Due to recent liquidation of Managed Fashions Ltd no order was required in respect of a fifth cause of action.
14/04/2010 *Russell v Commissioner of Inland Revenue* (2010) 24 NZTC 24,181 (HC). Judgment of Wylie J SRG Judd for the Appellant MJ Ruffin for the Respondent	Mr Russell sought an adjournment of a hearing. Wylie J was not persuaded that it was in the interests of justice to adjourn the hearing of the appeal. Rehearing would render otiose the assertion by Mr Russell that Judge Barber had a bias, whether actual or apparent, against him.
15/12/2011 *FB Duvall Ltd v Commissioner of Inland Revenue* (2011) 25 NZTC 20-101 (HC). Reserved judgment of Ellis J SRG Judd for the plaintiffs MJ Ruffin for the Defendant	Judicial review application under the Judicature Amendment Act 1972 of the Commissioner's refusal to accept late objections from the taxpayer in relation to GST assessments made in the early 1990s. Commissioner ordered to reconsider his decision to refuse to accept late GST objections from the plaintiff companies.

13/08/2012 *Russell v Commissioner of Inland Revenue* [2012] NZSC 73, (2012) 25 NZTC 20,140. Elias J, Tipping and William Young JJ Applicant in person MSR Palmer and MJ Ruffin for Respondent	The 'final chapter' in the Track E litigation. The Supreme Court declined leave to appeal on the basis that the statutory criteria had not been made out. No basis for concern that a substantial miscarriage of justice might occur if leave was not given.